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Page	*Line*	*For*	*Read*
189	foot note (8)	Co. Rep. III.	Co. Rep. V.
391	14	Policies	Bonus.
722	3	After s. 16 add	125, 126.
Do.	do.	Rule 125	275
723	— 9 and 10	Rule	Section.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Accidental and Marine Insurance Corporation, *In re. Ex parte* Briton Medical and General Life Association – – – 428
Addison's Case. *In re* Patent Paper Manufacturing Company – – – – – 294
Agriculturist Cattle Insurance Company, *In re.* Baird's Case 725
———————, *In re.* Dixon's Case – – 79
Albert Average Assurance Association, *In re* – – – 597
Allen *v.* Bonnett – – – 577
Anchor Assurance Company, *In re* – – – – – – 632
Anderson, *Ex parte. In re* Anderson – – – – – – 473
Anglo-Romano Water Company, *In re.* Wright's Case – – 437
Asiatic Banking Corporation, *In re.* Symons' Case – – 298
Atherton *v.* British Nation Assurance Company – – 720
Attorney-General *v.* Corporation of Halifax – – – – 116
——————— *v.* Leeds Corporation – – – – – 583
——————— *v.* Wax Chandlers' Company – – – 503

B.

PAGE

Baglan Hall Colliery Company, *In re* – – – – – – 346
Bagshaw, Evans *v.* – – – 340
Bailey *v.* Hobson – – – 180
Baird's Case. *In re* Agriculturist Cattle Insurance Company – 725
Bank of Hindustan, China, and Japan, *In re. Ex parte* Kintrea 95
———————, *In re.* Mitchell's Case – – 400
Barber, *Ex parte. In re* Barber 687
Barned's Banking Company, *In re.* Coupland's Claim – – 167
———————, *In re.* Forwood's Claim – – 18
Bathurst, Shepherd *v.* – – 193
———, Simpson *v.* – – 193
Blair, *Ex parte. In re* Mackle – 482
Blakely Ordnance Company, *In re.* Creyke's Case – – 63
Bolognesi's Case. *In re* London and Mediterranean Bank – 567
Bonnett, Allen *v.* – – – 577
Booth *v.* Coulton – – – 684
Bourton *v.* Williams – – 655
Bovill *v.* Cowan – – – 495
Bowers *v.* Bowers – – – 244
Bradford, Dinham *v.* – – 519
Bradford Navigation Company, *In re* – – – – – 600

PAGE
Bridger's Case. *In re* General Provident Assurance Company 305
British Nation Assurance Company, Atherton *v.* – – 720
Briton Medical and General Life Association, *Ex parte. In re* Accidental and Marine Insurance Corporation – – – 428
Broadridge, *In re. Ex parte* Cyrus 176
Brookman's Trusts, *In re* – 182
Bruce *v.* Garden – – – 32
Burdick *v.* Garrick – – 233, 453
Burn, Staight *v.* – – – 163
Busch, Orrell *v.* – – – 467
Butler *v.* Gray – – – 26

C.

Campbell, *Ex parte. In re* Cathcart – – – – – 703
Castle *v.* Wilkinson – – 534
Cathcart, *In re. Ex parte* Campbell – – – – – 703
Chichester *v.* Marquis of Donegall 497
City Bank *v.* Luckie – – 773
Clayton, *Ex parte. In re* Clayton 13
Cobre Copper Mining Company, *In re.* Weston's Case – – 614
Cockerell, Stuart *v.* – – – 713
Commercial Bank Corporation of India and the East, *In re.* Fernandes' Executors Case – 314
Constantinople and Alexandra Hotel Company, *In re.* Ebbett's Case – – – – – – 302
Contract Corporation, *In re.* Ebbw Vale Company's Case – 112
Cooper *v.* Cooper – – – 203
Coulton, Booth *v.* – – – 684
County Life Assurance Company, *In re* – – – – – – 288
Coupland's Claim. *In re* Barned's Banking Company – – 167
Cowan, Bovill *v.* – – – 495
Creyke's Case. *In re* Blakely Ordnance Company – – 63
Cuming, *In re* – – – 72
Cyrus, *Ex parte. In re* Broadridge 176

D.

Dimond, *Ex parte. In re* Williams 743
Dinham *v.* Bradford – – 519

PAGE
Dixon's Case. *In re* Agriculturist Cattle Insurance Company – 79
Donegall (Marquis of), Chichester *v.* – – – – 497
Dunn, Thompson *v.* – – 573

E.

Ebbetts' Case. *In re* Constantinople and Alexandria Hotel Company – – – – 302
Ebbw Vale Company's Case. *In re* Contract Corporation – 112
English and Scottish Marine Insurance Company, *In re. Ex parte* Maclure – – – 737
Estate Company, Limited and Reduced, *In re* – – – 407
European Bank, *In re. Ex parte* Oriental Commercial Bank – 358
Evans *v.* Bagshaw – – – 340

F.

Family Endowment Society, *In re* – – – – – 118
Fermoy (Lord), Land Credit Company of Ireland *v.* – – 763
———————————— *Ex parte* Munster – – – 323
Fernandes' Executors Case. *In re* Commercial Bank Corporation of India and the East – 314
Forbes and Judd's Case. *In re* Heyford Ironworks Company 270
Forwood's Claim. *In re* Barned's Banking Company – – 18
Foster, M'Creight *v.* – – 604
Fothergill, Lewis *v.* – – 103
Freeman *v.* Pope – – – 538
Frost, *In re* – – – – 699
Furber, Phillips *v.* – – – 746

G.

Garden, Bruce *v.* – – – 32
Garrick, Burdick *v.* – 233, 453
General Company for the Promotion of Land Credit, *In re* – 363
General Provident Assurance Company, *In re.* Bridger's Case – – – – – 305

PAGE

Gibbs *v.* Harding - - - 336
Giffard *v.* Williams - - - 546
Gilbert's Case. *In re* National Provincial Marine Insurance Company - - - - 559
Giles, *In re. Ex parte* Mauritz - 779
Gray, Butler *v.* - - - 26
Great Western and Brentford Railway Company, Stretton *v.* 751
Greaves, *Ex parte. In re* Greaves 326
Guest *v.* Smythe - - - 551

H.

Haley, Lee *v.* - - - - 155
Halifax, Corporation of, Attorney-General *v.* - - - - 116
Hall's Case. *In re* United Service Company - - - 707
Harding, Gibbs *v.* - - - 336
Harrison's Estate, *In re* - - 408
Hartridge and Allender, *Ex parte. In re* London, Chatham, and Dover Railway Arrangement Act - - - - - 671
Hayward *v.* Pile - - - 214
Heather, *In re* - - - 694
Heyford Ironworks Company, *In re.* Forbes and Judd's Case - 270
———— Pell's Case - - - - - 11
Hine, Picard *v.* - - - 274
Hobson, Bailey *v.* - - - 180
Hollyford Copper Mining Company, *In re* - - - - 93
Hood *v.* North Eastern Railway Company - - - - 525
Humber Ironworks and Shipbuilding Company, *In re.* Warrant Finance Company's Case. (No. 2.) - - - - 88

I.

International Contract Company, *In re.* G. H. Levita's Case - 489
International Life Assurance Society, *In re.* McIver's Claim - - - - 424
Isle of Wight Railway Company, Munns *v.* - - - - 414

PAGE

J.

Johnson, *Ex parte. In re* Johnson 741
Joint Stock Discount Company, *In re.* Warrant Finance Company's Case - - - 86

K.

Kemp, *In re. Ex parte* Prance - 16
Kintrea, *Ex parte. In re* Bank of Hindustan, China, and Japan 95
Knox *v.* Turner - - - 515

L.

Laing *v.* Reed - - - 4
Land Credit Company of Ireland *v.* Lord Fermoy - - - 763
———— *Ex parte* Munster - - - 323
Lawrence, Rushbrook *v.* - - 3
Lee *v.* Haley - - - - 155
Leeds Corporation, Attorney-General *v.* - - - - 583
Leggott *v.* Metropolitan Railway Company - - - - 716
Levita's (G. H.) Case. *In re* International Contract Company - - - - - 489
Lewis *v.* Fothergill - - 103
London and Mediterranean Bank, *In re.* Bolognesi's Case - 567
London, Chatham, and Dover Railway Arrangement Act, *In re. Ex parte* Hartridge and Allender - - - - 671
————, Hamburg, and Continental Exchange Bank, *In re.* Zulueta's Claim - - - 444
Lindgren, Wilkinson *v.* - - 570
Luckie, City Bank *v.* - - 773

M.

M'Creight *v.* Foster - - 604
McIver's Claim. *In re* International Life Assurance Society 424
Mackle, *In re. Ex parte* Blair - 482
Maclure, *Ex parte. In re* English and Scottish Marine Insurance Company - - - - 737
Manceaux, *Ex parte* - - 518

PAGE

Manchester and London Life Assurance and Loan Association, *In re* 640
Mauritz, *Ex parte.* *In re* Giles 779
Metropolitan Railway Company, Leggott *v.* 716
Mills *v.* Northern Railway of Buenos Ayres Company 621
Mitchell's Case. *In re* Bank of Hindustan, China, and Japan 400
Morris, *Ex parte.* *In re* Duke of Newcastle 172
———, Pearce *v.* 227
——— *v.* Wright 279
Mostyn *v.* Mostyn 457
Munns *v.* Isle of Wight Railway Company 414
Munster, *Ex parte.* Land Credit Company of Ireland *v.* Lord Fermoy 323

N.

Natal Investment Company, *In re.* Snell's Case 22
National Permanent Benefit Building Society, *In re.* *Ex parte* Williamson 309
National Provincial Marine Insurance Company, *In re.* Gilbert's Case 559
Newcastle (Duke of), *In re.* *Ex parte* Morris 172
Nicholas, Pike *v.* 251
Nicholson, *Ex parte.* *In re* Nicholson 332
North Eastern Railway Company, Hood *v.* 525
Northern Assam Tea Company, *In re* 644
Northern Railway of Buenos Ayres Railway Company, Mills *v.* 621

O.

Oriental Commercial Bank, *Ex parte.* *In re* European Bank 358
Oriental Hotels Company, Perry *v.* 420
Orrell *v.* Busch 467
Oxford and Canterbury Hall Company, *In re* 433

PAGE

P.

Palmer, *Ex parte.* *In re* Palmer 470
Panama, New Zealand, and Australian Royal Mail Company, *In re* 318
Parkes *v.* Stevens 36
Patent Paper Manufacturing Company, *In re.* Addison's Case 294
Pearce *v.* Morris 227
Peek *v.* Spencer 548
Pell's Case. *In re* Heyford Ironworks Company 11
Perry *v.* Oriental Hotels Company 420
Phené's Trusts, *In re* 139
Phillips *v.* Furber 746
Picard *v.* Hine 274
Pike *v.* Nicholas 251
Pile, Hayward *v.* 214
Pooley, *Ex parte.* *In re* Russell 722
Pope, Freeman *v.* 538
Portland (Duke of), Topham *v.* 40
Potteries, Shrewsbury, and North Wales Railway Company, *In re* 67
Prance, *Ex parte.* *In re* Kemp 16

R.

Reed, Laing *v.* 4
Richardson *v.* Smith 648
Rigden, Earl Vane *v.* 663
Roskell *v.* Whitworth 459
Rushbrook *v.* Lawrence 3
Russell, *In re.* *Ex parte* Pooley 722

S.

Shepherd *v.* Bathurst 193
Simpson *v.* Bathurst 193
———, Thomson *v.* 659
Smith, Richardson *v.* 648
——— *v.* Smith 342
Smythe, Guest *v.* 551
Snell's Case. *In re* Natal Investment Company 22
Sparrow, *In re* 662
Spencer, Peek *v.* 548
Staight *v.* Burn 163
Stevens, Parkes *v.* 36
Stone *v.* Stone 74

	PAGE
Stone *v.* Thomas	219
Strang, *Ex parte.* *In re* Universal Banking Corporation	492
Stretton *v.* Great Western and Brentford Railway Company	751
Stuart *v.* Cockerell	713
Symons' Case. *In re* Asiatic Banking Corporation	298

T.

Thomas, Stone *v.*	219
Thompson *v.* Dunn	573
Thomson *v.* Simpson	659
Times Life Assurance and Guarantee Company, *In re*	381
Topham *v.* Duke of Portland	40
Trick's Trusts, *In re.* *Ex parte* Willoby	170
Turner, Knox *v.*	515

U.

United Service Company, *In re.* Hall's Case	707
Universal Banking Corporation, *In re.* *Ex parte* Strang	492

V.

Vane (Earl) *v.* Rigden	663

W.

Walters *v.* Webb	531
Warrant Finance Company's Case (No. 2). *In re* Humber Ironworks and Shipbuilding Company	88
Warrant Finance Company's Case. *In re* Joint Stock Discount Company	86
Wax Chandlers' Company, Attorney-General *v.*	503
Webb, Walters *v.*	531
Western Life Assurance, *In re.* *Ex parte* Willett	396
Weston's Case. *In re* Cobre Copper Mining Company	614
White, *In re*	698
Whitworth, Roskell *v.*	459
Wieland, *Ex parte.* *In re* Wieland	486
Wilkinson, Castle *v.*	534
———— *v.* Lindgren	570
Willett, *Ex parte.* *In re* Western Life Assurance Society	396
Williams, *In re.* *Ex parte* Dimond	743
————, Bourton *v.*	655
————, Giffard *v.*	546
Williamson, *Ex parte.* *In re* National Permanent Benefit Building Society	309
Willoby, *Ex parte.* *In re* Trick's Trusts	170
Wright, Morris *v.*	279
Wright's Case. *In re* Anglo-Romano Water Company	437

Y.

Yates, *Ex parte*	1

Z.

Zulueta's Claim. *In re* London, Hamburg, and Continental Exchange Bank	444

TABLE OF CASES CITED.

A.

		PAGE
——— *v.* Walford	4 Russ. 372	612
Adams *v.* Fisher	3 My. & Cr. 526	576
——— *v.* London and Blackwall Railway Company	3 Mac. & G. 118	758
Addison *v.* Walker	4 Y. & C. Ex. 442	500
Adkins *v.* Bliss	2 De G. & J. 286	324
Agar *v.* Athenæum Life Assurance Society	3 C. B. (N.S.) 725	292
Agra and Masterman's Bank, In re	Law Rep. 2 Ch. 391	659
Agriculturist Cattle Insurance Company, Re	3 D. F. & J. 194	599
Alexander, Ex parte	1 D. J. & S. 311	704
——— *v.* Alexander	2 Ves. Sen. 640	209
Alloway *v.* Alloway	4 D. & War. 380	245
Alsager *v.* Rowley	6 Ves. 748	666
Alton *v.* Harrison	Law Rep. 4 Ch. 622	579
Andrews' Case	Law Rep. 3 Ch. 161	430
——— *v.* Hulse	4 K. & J. 392	531
Anglesea Colliery Company, In re	Law Rep. 2 Eq. 379; Ibid. 1 Ch. 555	97, 351
Anon.	2 Wils. 135	178
Anthony *v.* Seger	1 Hagg. Consist. 9	723
Armitage *v.* Walker	3 K. & J. 211	6
Arnold *v.* Attorney-General	Show. P. C. 22; Duke's Charitable Uses, 591	506
——— *v.* Hardwick	7 Sim. 343	207
Arthur *v.* Lamb	2 Dr. & Sm. 428	181
Askham *v.* Barker	17 Beav. 37	208
Athenæum Life Assurance Society, In re	4 K. & J. 549	292
Attorney-General *v.* Alford	4 D. M. & G. 843	236
——— *v.* Bouwens	4 M. & W. 171	316
——— *v.* Colney Hatch Lunatic Asylum	Law Rep. 4 Ch. 146	590
——— *v.* Coopers' Company	3 Beav. 29	506
——— *v.* Cordwainers' Company	3 My. & K. 534	507
——— *v.* Cox	3 H. L. C. 240	20
——— *v.* Drapers' Company	2 Beav. 508	506
——— *v.* ———	4 Beav. 67	506
——— *v.* Earl of Winchelsea	3 Bro. C. C. 373	506
——— *v.* Edmunds	Law Rep. 6 Eq. 331	237

		PAGE
Attorney-General *v.* Grocers' Company	6 Beav. 526	507
——— *v.* Jesus College, Oxford	29 Beav. 163	507
——— *v.* Manchester and Leeds Railway Company	1 Railw. Cas. 436	677
——— *v.* Mayor of Bristol	2 Jac. & W. 294; 3 Madd. 319	506
——— *v.* Mayor of Coventry	2 Vern. 397	506
——— *v.* Mayor of Exeter	Jac. 443	507
——— *v.* Portreve of Avon	11 W. R. 1050	341
——— *v.* Proprietors of Bradford Canal	Law Rep. 2 Eq. 71	590
——— *v.* Skinners' Company	2 Russ. 407	506

B.

Badham *v.* Mee	7 Bing. 695	196
Bahia and San Francisco Railway Company, In re	Law Rep. 3 Q. B. 584	97
Baker *v.* Baker	6 H. L. C. 616	686
—— *v.* Sutton	1 Keen, 224	571
Baldwin *v.* Rogers	3 D. M. & G. 649	715
Balls *v.* Margrave	3 Beav. 448	500
Barge's Case	Law Rep. 5 Eq. 420	354
Barkworth *v.* Young	4 Drew, 1	189
Barnes *v.* Wood	Law Rep. 8 Eq. 424	535
Bateman *v.* Countess of Ross	1 Dow. 235	338
—— *v.* Pinder	3 Q. B. 574	458
Bates and Redgate, Ex parte	Law Rep. 4 Ch. 577	2, 519
Battier, Ex parte	Buck. 426	329
Beadel *v.* Perry	Law Rep. 3 Eq. 465	165
Beasney's Trusts, In re	Law Rep. 7 Eq. 498	141
Beaufort (Duke of) *v.* Neeld	12 Cl. & F. 248	458
Bebb *v.* Penoyre	11 East, 160	411
Belcher *v.* Prittie	10 Bing. 408	579
Belhaven's (Lord) Case	3 D. J. & S. 41	84
Bell *v.* Bird	Law Rep. 6 Eq. 635	221
—— *v.* Hull and Selby Railway Company	1 Railw. Cas. 616	758
Benham's Trusts, In re	Law Rep. 4 Eq. 416	141
Bennett's Trusts, In re	3 K. & J. 280	715
Benson *v.* Hadfield	4 Hare, 32	127
Bentley *v.* Oldfield	19 Beav. 225	411
Berwick (Mayor of) *v.* Murray	7 D. M. & G. 519	237
Bevan *v.* Nunn	9 Bing. 107	579
Beverley (Mayor of) *v.* Attorney-General	6 H. L. C. 310	507
Beville's (Baron de) Case	Law Rep. 7 Eq. 11	12, 271, 351
Bills *v.* Smith	6 B. & S. 314	579
Bingley *v.* Madison	Cooke, Bkcy. Law, p. 20	178
Birch *v.* Sherratt	Law Rep. 2 Ch. 644	686
Birkbeck Life Assurance Company, In re	2 Dr. & Sm. 321	98
Birley *v.* Birley	25 Beav. 299	53, 207
Birmingham Banking Company, Ex parte	Law Rep. 3 Ch. 651	568
Bissell *v.* Jones	Law Rep. 4 Q. B. 49	333
Bittleston *v.* Cooke	6 E. & B. 296	578
Blakeley's Case	13 Beav. 133; 3 Mac. & G. 726	730
Blogg *v.* Johnson	Law Rep. 2 Ch. 225	236
Bond *v.* Graham	1 Hare, 482	316
Bonsor, Ex parte	2 Rose, 61	488
Boswall, Re	10 W. R. 533	15

		PAGE
Botten, Ex parte	Mont. & Bl. 412	178
Bovill *v.* Hitchcock	Law Rep. 3 Ch. 417	462
Bowen *v.* Brecon Railway Company	Law Rep. 3 Eq. 541	69
Bower *v.* Marris	Cr. & Ph. 351	91
Bowes *v.* Hope Mutual Society	11 H. L. C. 389	373
Bowmer, In re	3 De G. & J. 658	663
Bradley *v.* Bevington	4 Drew. 511	461
Bradshaw, Ex parte	2 D. M. & G. 900	698
Bramble *v.* Moss	Law Rep. 3 C. P. 458	748
Brennard's Patent, In re	3 D. F. & J. 695	519
Bridger's and Neill's Case	Law Rep. 4 Ch. 266	65
Bristol and North Somerset Railway Company, In re	Law Rep. 6 Eq. 448	69
Bristow, In re	Law Rep. 3 Ch. 247	172
—— *v.* Warde	2 Ves. 336	209
British Sugar Refining Company, In re	3 K. & J. 408	97
Brittlebank *v.* Goodwin	Law Rep. 5 Eq. 545	77
Brook *v.* Brook	3 Sm. & Giff. 280	31
Brookes, Ex parte	Buck. 257	329
Brotherhood's Case	31 Beav. 365	83
Brown, Ex parte	Mont. & Ch. 177	742
—— *v.* Freeman	4 De G. & Sm. 444	36
—— *v.* Higgs	8 Ves. 574	30
Browne *v.* Lockhart	10 Sim. 420	500
Bryson *v.* Warwick and Birmingham Canal Company	4 D. M. & G. 711	448
Budd, Ex parte	1 M. D. & D. 436	742
Burbidge *v.* Robinson	2 Mac. & G. 244	496
Burdick *v.* Garrick	Law Rep. 5 Ch. 453	720
Burkinshaw *v.* North Western Railway Company	5 Ex. 475	758
Burrowes *v.* Gore	6 H. L. C. 907	77
—— *v.* Lock	10 Ves. 470	610
Butler *v.* Carter	Law Rep. 5 Eq. 276	77

C.

Cadbury *v.* Smith	Law Rep. 9 Eq. 37	236
Calvert, Ex parte	3 De G. & J. 95	328
Cambrian Railway Company's Scheme, In re	Law Rep. 3 Ch. 278	69
Campbell *v.* Walker	5 Ves. 678	555
Capper's Case	Law Rep. 3 Ch. 458	300, 619
Carralli and Haggard's Claim	Law Rep. 4 Ch. 174	493
Carew's Estate, In re	31 Beav. 39	360
——, In re	26 Beav. 187	555
Carrick, Ex parte	2 De G. & J. 208	659
Carter, In re	Law Rep. 1 Ch. 170	485
Carven, In re	8 Beav. 436	696
Carver *v.* Richards	27 Beav. 488; 1 D. F. & J. 548	53, 209
Cassidy *v.* Steuart	2 Man. & G. 437	172
Castello's Case	Law Rep. 8 Eq. 504	299
Catlin, In re	18 Beav. 508	696
Cattlin *v.* Brown	11 Hare, 372	344
Challenger *v.* Sheppard	8 T. R. 597	245
Chambers, Ex parte	2 Mont. & A. 440	487

		PAGE
Chambers, In re	34 Beav. 177	696
Charles *v.* Marsden	1 Taunt. 224	360
Cholmondeley *v.* Clinton	2 Jac. & W. 184	228
Christian *v.* Devereux	12 Sim. 264	316
Christ's Hospital *v.* Grainger	1 Mac. & G. 460	506
Clarke *v.* Clark	Law Rep. 1 Ch. 16	165
Clayton *v.* Lowe	5 B. & A. 636	245
Clegg *v.* Edmondson	22 Beav. 125; 8 D. M. & G. 787	83, 575
Clogstoun *v.* Walcott	13 Sim. 523	29
Cockburn, Ex parte	3 D. J. & S. 175	334
Cockcroft *v.* Sutcliffe	25 L. J. (Ch.) 313	208
Colemere, In re	Law Rep. 1 Ch. 128	579
Collingwood's Trusts, Re	6 W. R. 536	73
Collinridge *v.* Farquharson	1 Stark. 259	360
Colyer *v.* Finch	5 H. L. C. 905	360
Commercial Bank of India, In re	Law Rep. 6 Eq. 517	373
Commercial Banking Corporation of India and the East, In re	16 W. R. 958	127
Connolly *v.* M'Dermott	Sug. H. of L. 513	208
Cook *v.* Caldecott	Moo. & Mal. 522	475
—— *v.* Collingridge	Jac. 607	522
Cookes *v.* Cookes	2 D. J. & S. 526	422
Cooper *v.* Cooper	1 K. & J. 658	245, 247
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	311
Corner *v.* Sweet	Law Rep. 1 C. P. 456	402
Cosens *v.* Bognor Railway Company	Law Rep. 1 Ch. 594	416
Courtenay *v.* Wright	2 Giff. 337	34, 516
Coventry *v.* Barclay	33 Beav. 1; 3 D. J. & S. 320	692
Cowen, In re	Law Rep. 2 Ch. 563	327, 334
Crackelt *v.* Bethune	1 Jac. & W. 586	238
Crawley's Case	Law Rep. 4 Ch. 322	491
Cripps *v.* Davis	12 M. & W. 159	458
—— *v.* Wolcott	4 Madd. 11	247
Crisp *v.* Platel	8 Beav. 62	500
Croft, In re	32 L. J. (Ch.) 481	702
Crompe *v.* Barrow	4 Ves. 681	209
Crump *v.* Lambert	Law Rep. 3 Eq. 409	463
Curtis's Case	Law Rep. 6 Eq. 455	93, 300
Cutts *v.* Thodey	13 Sim. 206; 1 Coll. 223 n.	609

D.

Daniels *v.* Davison	16 Ves. 249	609
Darbey *v.* Whittaker	4 Drew. 134	651
Darbon *v.* Rickards	14 Sim. 537	685
Daubeny *v.* Cockburn	1 Mer. 626	207
Davenport *v.* Goldberg	2 H. & M. 282	462
Davis *v.* Earl of Dysart	21 Beav. 124	696
Deacon, Ex parte	Law Rep. 4 Ch. 87	327
Dearle *v.* Hall	3 Russ. 1	610
Delarue *v.* Dickinson	3 K. & J. 388	575
Dent *v.* Auction Mart Company	Law Rep. 2 Eq. 238	165
De Pass's Case	4 De G. & J. 544	101
Dewhirst *v.* Jones	3 H. & C. 60	333
Dewhurst *v.* Clarkson	3 E. & B. 194	6

		PAGE
Diack, Ex parte	2 Mont. & A. 675	487
Dimes *v.* Grand Junction Canal	9 Q. B. 469	531
Dinham *v.* Bradford	Law Rep. 5 Ch. 519	651
Dobinson *v.* Hawks	16 Sim. 407	6
Doe *v.* Cundall	9 East, 400	410
—— *v.* Frost	1 B. & C. 638	411
—— *v.* Hale	15 Q. B. 171	458
—— *v.* Harrison	6 Q. B. 631	531
—— *v.* Holmes	2 Wils. 80	410
—— *v.* Muscott	12 M. & W. 832	531
—— *v.* Nepean	5 B. & Ad. 86; 2 M. & W. 894	141
—— *v.* Sparrow	13 East, 359	246
—— *v.* Trueman	1 B. & Ad. 736	531
Dolan *v.* Macdermot	Law Rep. 3 Ch. 676	571
Dowley *v.* Winfield	14 Sim. 277	142
Droitwich Patent Salt Company *v.* Curzon	Law Rep. 3 Ex. 35	354
Drummond's Case	Law Rep. 4 Ch. 772	12, 271, 350
Drysdale *v.* Piggott	8 D. M. & G. 546	516
Duckworth, In re	Law Rep. 2 Ch. 578	493
Dunn *v.* Snowden	2 Dr. & Sm. 201	141
Dyer *v.* Hargrave	10 Ves. 505	719

E.

Eaden *v.* Firth	1 H. & M. 573	462
Egan *v.* Guardians of Kensington Union	3 Q. B. 935 (n.)	458
Egerton *v.* Earl Brownlow	4 H. L. C. 1	412
Elisha *v.* Elisha	Set. Dec. 3rd Ed. 475	229
Elkington's Case	Law Rep. 2 Ch. 511	296, 306
Elliot *v.* Ince	7 D. M. & G. 475	275
Elliott *v.* Elliott	15 Sim. 321	29
Ellis *v.* Selby	7 Sim. 352	571
Elt *v.* Burial Board of St. Mary, Islington	Kay, 449	723
Ely (Dean of) *v.* Bliss	2 D. M. & G. 459	531
Emery *v.* Wase	5 Ves. 846	535
Era Company's Case	1 D. J. & S. 29	127
Ernest *v.* Croysdill	2 D. F. & J. 175	448
——— *v.* Nicholls	6 H. L. C. 401	448
Esdaile *v.* La Nauze	1 Y. & C. Ex. 394	360
Evans *v.* Coventry	5 D. M. & G. 911	127
——— *v.* Smallcombe	Law Rep. 3 H. L. 249	83
Evans's Case	Law Rep. 2 Ch. 427	24, 271, 355, 710
Exley *v.* Inglis	Law Rep. 3 Ex. 247	476
Eyre *v.* Munroe	3 K. & J. 305	189

F.

Factage Parisien, In re	34 L. J. (Ch.) 140	373
Family Endowment Society, In re	Law Rep. 5 Ch. 118	390, 641
Farthing *v.* Allen	2 Madd. 310	245
Featherstonhaugh *v.* Fenwick	17 Ves. 298	522
Feiling and Rimington's Case	Law Rep. 2 Ch. 714	354
Fenton *v.* Browne	14 Ves. 144	719
Fergus (Executors of) *v.* Gore	1 Sch. & Lef. 350	555
Fernie *v.* Young	Law Rep. 1 H. L. 63	462

		PAGE
Financial Corporation *v.* Lawrence	Law Rep. 4 C. P. 731	402
Fitzroy *v.* Duke of Richmond	27 Beav. 190	208
Flower, Ex parte	De G. 503	487
Foley *v.* Hill	2 H. L. C. 28	236
Forbes and Judd's Case	Law Rep. 5 Ch. 270	351
Foster *v.* Smith	1 Ph. 629	685
Foxley, Ex parte	Law Rep. 3 Ch. 515	578
Fox's Case	Law Rep. 5 Eq. 118	83
Foxwell *v.* Bostock	12 W. R. 723	37
Francis *v.* Wigzell	1 Madd. 258	276
Freake *v.* Cranefeldt	3 My. & Cr. 499	236
Freeman *v.* Tottenham and Hampstead Railway Company	11 Jur. (N.S.) 254	462
Freme *v.* Brade	2 De G. & J. 582	36
Frogmorton *v.* Holyday	3 Burr. 1618	409
Fullagar *v.* Clark	18 Ves. 481	461
Furness *v.* Caterham Railway Company	27 Beav. 358	321

G.

Galloway *v.* Corporation of London	3 D. J. & S. 59	721
Gardner *v.* London, Chatham, and Dover Railway Company	Law Rep. 2 Ch. 201	320
Gee *v.* Mayor of Manchester	17 Q. B. 737	245
George *v.* Whitmore	26 Beav. 557	461
German Mining Company, In re	4 D. M. & G. 19	311
Gibbs *v.* Daniel	4 Giff. 1	454
Gibson, Ex parte	Law Rep. 4 Ch. 662	127, 391
Gillespie *v.* Hamilton	3 Madd. 251	731
Gladstone *v.* Ottoman Bank	1 H. & M. 505	677
Glaister *v.* Hewer	7 T. R. 498	178
Gloucester (Corporation of) *v.* Wood	1 Ph. 493	720
Glover *v.* Hall	2 Ph. 484	501
Goodman *v.* Kine	8 Beav. 379	181
Gosling *v.* Townshend	17 Beav. 245; on app. 2 W. R. 23	245
Gottlieb *v.* Cranch	4 D. M. & G. 440	516
Gouthwaite, Ex parte	3 Mac. & G. 187	731
Gower's Case	2 Bro. P. C. 148	555
Graham *v.* Birkenhead, &c., Railway Company	2 Mac. & G. 146	758
——— *v.* Chapman	12 C. B. 85	578
Green's Estate, Re	1 Dr. & Sm. 68	246
——— Settlement, In re	Law Rep. 1 Eq. 288	141
Grove *v.* Cox	1 Taunt. 165	458
Gunn's Case	Law Rep. 3 Ch. 40	491

H.

Hamer's Devisees' Case	2 D. M. & G. 366	731
Hammersmith and City Railway Company *v.* Brand	Law Rep. 4 H. L. 171	590
Hardwicke *v.* Vernon	14 Ves. 504	237
Harmar *v.* Playne	11 East, 101	37
Harnden, Ex parte	3 De G. & J. 489	328

		PAGE
Harris *v.* Lord Mountjoy	2 Leon, 173	172
Hart *v.* Alexander	2 M. & W. 484	127
—— *v.* Smith	Law Rep. 4 Q. B. 61	327
Hassells *v.* Simpson	1 Doug. 89 n.	578
Hastie's Case	Law Rep. 4 Ch. 274	403
Head *v.* Godlee	Joh. 536	209
Heath *v.* Bucknall	Law Rep. 8 Eq. 1	165
—— *v.* Henley	1 Cas. C. 20	237
Heathcote *v.* North Staffordshire Railway Company	2 Mac. & G. 100	677
Henderson *v.* Eason	17 Q. B. 704; 2 Ph. 308	181
Henessey's Executors' Case	3 De. G. & Sm. 191	300
Hepburn, Ex parte	15 W. R. 1065	172
Hepworth v. Heslop	6 Hare, 561	666
Heward *v.* Wheatley	3 D. M. & G. 628	731
Hewitt *v.* Loosemore	9 Hare, 449	360
Heyden, Ex parte	2 Gl. & J. 52	485
Hinchinbroke *v.* Seymour	1 Bro. C. C. 394	53
Hindmarsh, In re	1 Dr. & Sm. 129	236
Hobart *v.* Butler	9 Ir. C. L. Rep. 157	458
Hobson *v.* Jones	Law Rep. 9 Eq. 456	749
Hogg *v.* Kirby	8 Ves. 215	158
Hoggins *v.* Gordon	3 Q. B. 466	458
Holmes *v.* Kidd	3 H. & N. 891	360
—— *v.* Penney	3 K. & J. 90	539
Holroyd *v.* Marshall	10 H. L. C. 191	320
Home *v.* Pillans	2 My. & K. 15	245
Horne, Ex parte	7 B & C. 632	316
—— *v.* Barton	8 D. M. & G. 587	209
Houldsworth *v.* Evans	Law Rep. 3 H. L. 263	83, 731
Howbeach Coal Company *v.* Teague	29 L. J. (Ex.) 137	292
Hughes, Ex parte	6 Ves. 617	555
Huguenin *v.* Baseley	14 Ves. 273	61
Hunt *v.* Hunt	4 D. F. & J. 221	337
Hutton *v.* Cruttwell	1 E. & B. 15	579
—— *v.* Scarborough Cliff Hotel Company	13 W. R. 631, 1059	710
Hyam's Case	1 D. F. & J. 75	101
Hyde *v.* Mayor, &c., of Manchester	12 C. B. 474; 5 De G. & Sm. 249	758

I.

Ilderton *v.* Jewell	14 C. B. (N.S.) 665	327
Imbert, Ex parte	1 De G. & J. 152	659
Inchbald *v.* Robinson	Law Rep. 4 Ch. 388	462
Inman *v.* Clare	Joh. 769; 5 Jur. (N.S.) 89	775
International Contract Corporation, In re	Law Rep. 1 Ch. 523	599, 645
Isenberg *v.* East India House Estate Company	33 L. J. (Ch.) 392	761

J.

Jackson *v.* Jackson	7 Cl. & F. 977	208
—— *v.* ——	1 Sm. & Giff. 184	651
Jacobs *v.* Seward	Law Rep. 4 C. P. 328	181
James, Ex parte	8 Ves. 337	222

		PAGE
James *v.* Biou	3 Sw. 234	228
—— *v.* Holmes	31 L. J. (Ch.) 567	237
Jebb *v.* Tugwell	7 D. M. & G. 603	208
Jefferys *v.* Boosey	4 H. L. C. 815	284, 375
Jenkyn *v.* Vaughan	3 Drew. 419	540
Jersey (Earl of) *v.* Briton Ferry Floating Dock Company	Law Rep. 7 Eq. 409	416
Joint Stock Discount Company, In re	Law Rep. 5 Ch. 86	92
—— *v.* Brown	Law Rep. 3 Eq. 139; Ibid. 8 Eq. 381	448, 769
Jones *v.* Foxall	15 Beav. 388	237
—— *v.* How	7 Hare, 267	189
—— *v.* Jones	5 Hare, 440	218
—— *v.* ——	Kay, App. vi.	500
—— *v.* Matthie	11 Jur. 504	744
—— *v.* Winwood	10 Sim. 150; 3 M. & W. 653	196
Johnson *v.* Gallagher	3 D. F. & J. 494; 7 Jur. (N.S.) 273	276
—— *v.* Osenton	Law Rep. 4 Ex. 107	748

K.

Kearns *v.* Leaf	1 H. & M. 681	127
Keene's Executors' Case	3 D. M. & G. 272	731
Kellock's Case	Law Rep. 3 Ch. 769	20, 87, 91, 115, 169, 435
Kelly *v.* Morris	Law Rep. 1 Eq. 697	282
Kennedy *v.* Broun	13 C. B. (N.S.) 677	458
—— *v.* Green	3 My. & K. 699	360
—— *v.* ——	6 Sim. 6	500
Kent Benefit Building Society, In re	1 Dr. & Sm. 417	6, 311
Kent *v.* Burgess	11 Sim. 361	463
Kershaw *v.* Matthews	2 Russ. 62	522
Kimbray *v.* Draper	Law Rep. 3 Q. B. 160	476
King, Ex parte	Law Rep. 4 Eq. 566; Ibid. 3 Ch. 10	402
—— *v.* Marshall	33 Beav. 565	321
Kintrea, Ex parte	Law Rep. 5 Ch. 95	564
Kirwan *v.* Kirwan	2 C. & M. 617	392

L.

Lacey, Ex parte	6 Ves. 625	222
Laing *v.* Reed	Law Rep. 5 Ch. 4	311
Lakin *v.* Lakin	34 Beav. 443	142
Lambe *v.* Orton	6 Jur. (N.S.) 61; 8 W. R. 111	141
Lampleigh *v.* Brathwaite	Hob. 105	457
Lancashire *v.* Lancashire	9 Beav. 259	461
Lancaster and Carlisle Railway Company *v.* North Western Railway Company	2 K. & J. 293	677
Lane *v.* Page	Amb. 233	207
Langston *v.* Blackmore	Amb. 288	209
Langton *v.* Waring	18 C. B. (N.S.) 315	659
Lasseur *v.* Tyrconnel	10 Beav. 28	316
Latimer *v.* Neate	4 Cl. & F. 570	500
Laughter's Case	Co. Rep. v. 41	189
Lawrence, Ex parte	1 D. J. & S. 307	222

		PAGE
Laycock v. Johnson	6 Hare, 199	222
Lea v. Hinton	5 D. M. & G. 823	516
Leather Cloth Company v. American Leather Cloth Company	11 H. L. C. 523	158
Lee v. Hart	11 Ex. 880	475
—— v. Head	1 K. & J. 620	208
—— v. Zagury	8 Taunt. 114	360
Leifchild's Case	Law Rep. 1 Eq. 231	351
Lepard v. Vernon	2 V. & B. 51	667
Levita's Case	Law Rep. 3 Ch. 36	491
Lewis v. Fullarton	2 Beav. 6	284
Lister v. Leather	8 E. & B. 1004	38
——— v. Lister	6 Ves. 631	555
Litchfield's Case	3 De G. & Sm. 141	300
Lloyd v. Attwood	3 De G. & J. 90	544
——— v. London, Chatham, and Dover Railway Company	2 D. J. & S. 568	527
Lockett v. Lockett	Law Rep. 4 Ch. 336	575
Lockhart v. Hardy	9 Beav. 349	435
London and Mediterranean Bank, In re	Law Rep. 3 Ch. 651	311
London, Bombay, and Mediterranean Bank, In re	Law Rep. 1 Ch. 525	599, 645
———, Hamburg, and Continental Exchange Bank v. Henry	Law Rep. 7 Eq. 334	448
Long v. Rankin	Sug. Pow. 8th Ed., App. 895	202
Lord v. Colvin	1 Dr. & Sm. 475	454
Loring v. Thomas	1 Dr. & Sm. 497	410
Louch, Ex parte	De G. 463	488
Loveridge v. Botham	1 B. & P. 49	696
———— v. Cooper	3 Russ. 30	612
Lumsden's Case	Law Rep. 4 Ch. 31	97, 300
Lytton v. Great Northern Railway Company	2 K. & J. 394	527

M.

Macdougall v. Jersey Imperial Hotel Company	2 H. & M. 528	627
McGhie v. McGhie	2 Madd. 368	189
McIntyre v. Belcher	14 C. B. (N.S.) 654	739
McMahon v. Burchell	2 Ph. 127	181
Maddison v. Andrew	1 Ves. Sen. 57	30
Madrid and Valencia Railway Company, In re	3 De G. and Sm. 127; 2 Mac. & G. 169	373
Magnus, Ex parte	2 M. D. & D. 604	178
Makepeace v. Rogers	34 L. J. (Ch.) 396	237
Malkin v. Adams	2 Rose, 28	488
Manchester and London Life Assurance Association, In re	Law Rep. 9 Eq. 643	393
Mangles v. Dixon	3 H. L. C. 702	609
Mann's Case	Law Rep. 3 Ch. 459, n.	300, 619
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	321
Marks v. Feldman	Law Rep. 5 Q. B. 275	579
Marlow v. Pitfield	1 P. Wms. 558	313
Marsden's Trusts, In re	4 Drew. 594	57
Marsh and Rainsford's Case	Leon. 111	457
Martin v. Headon	Law Rep. 2 Eq. 425	165
——— v. Knowllys	8 T. R. 145	181

		PAGE
Martin *v.* London, Chatham, and Dover Railway Company	Law Rep. 1 Ch. 501	757
——— *v.* Powning	Law Rep. 4 Ch. 356	223
Mason *v.* Bogg	2 My. & Cr. 443	20
——— *v.* Mason	1 Mer. 308	145
Maunsell *v.* White	4 H. L. C. 1039	659
Maxoudoff, Ex parte	Law Rep. 6 Eq. 582	435
Mayer *v.* Townsend	3 Beav. 443	30
Mendes *v.* Guedalla	2 J. & H. 259	769
Mercer *v.* Peterson	Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104	579
Mercers' Company *v.* Attorney-General	2 Bli. (N.S.) 165	506
Mew and Thorne, Re	10 W. R. 790	15
Meymot, Ex parte	1 Atk. 196	172
Migotti's Case	Law Rep. 4 Eq. 238	12, 271, 351
Milligan *v.* Mitchell	1 My. & Cr. 433	550
Milnes *v.* Gery	14 Ves. 400	651
Mitchell's Case	Law Rep. 5 Ch. 400	494
Mitchell's Patent, In re	Law Rep. 2 Ch. 343	2, 519
Moone *v.* Heaseman	Willes, 138	411
Morgan, Ex parte	1 Mac. & G. 225	83
——— *v.* Fuller	Law Rep. 2 Eq. 296	462
——— *v.* Millman	3 D. M. & G. 24	651
Morice *v.* Bishop of Durham	11 Ves. 57	555
——— *v.* ———	10 Ves. 522	571
Morland *v.* Isaac	20 Beav. 389	34, 516
Mornington (Countess of) *v.* Keane	2 De G. & J. 292	337
Morres *v.* Hodges	27 Beav. 625	216
Morris *v.* Ashbee	Law Rep. 7 Eq. 34	282
Morrison *v.* Barrow	1 D. F. & J. 633	461
Morse *v.* Merest	6 Madd. 26	651
Moxon *v.* Bright	Law Rep. 4 Ch. 292	237
Mullock *v.* Jenkins	14 Beav. 628	5
Murray *v.* Barlee	3 My. & K. 209	276
——— *v.* East India Company	5 B. & A. 204	237

N.

Natal, &c. Company, In re	1 H. & M. 639	373
Needham *v.* Kirkman	3 B. & A. 531	189
——— *v.* Smith	4 Russ. 318	189
——— *v.* ———	2 Vern. 463	770
Nelthorpe *v.* Holgate	1 Coll. 203	535
Ness, Ex parte	5 C. B. 155	328
New Clydach Sheet and Bar Iron Company, In re	Law Rep. 6 Eq. 514	321
Nicholl *v.* Jones	2 H. & M. 588	496
Noel *v.* Walsingham	2 S. & S. 99	208
Northumberland and Durham District Banking Company, In re	2 De G. & J. 357	375

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	375
Other *v.* Smirthwaite	Law Rep. 5 Eq. 437	462
Owens *v.* Dickenson	Cr. & Ph. 48	276

P.

		PAGE
Page, Ex parte	1 D. J. & S. 283	328
Palmer, Ex parte	Law Rep. 5 Ch. 470	475
——— *v.* Wheeler	2 Ball & B. 18	207
Palsgrave *v.* Atkinson	1 Coll. 190	209
Paris *v.* Miller	5 M. & S. 408	411
Parsons' Case	Law Rep. 8 Eq. 656	297, 300, 619
Parsons *v.* Coke	4 Drew. 296	246
Partington *v.* Attorney-General	Law Rep. 4 H. L. 100	316
Patch *v.* Ward	Law Rep. 1 Eq. 436	500
Peacock *v.* Harris	10 East, 104	458
Pearce *v.* Chamberlain	2 Ves. Sen. 33	731
——— *v.* Morris	Law Rep. 5 Ch. 227	609
Pearse *v.* Green	1 Jac. & W. 135	238
——— *v.* Pearse	9 Sim. 430	316
Pearson, Ex parte	Law Rep. 3 Ch. 443	568
Peel's Case	Law Rep. 2 Ch. 674	375
Pell *v.* Northampton and Banbury Junction Railway Company	Law Rep. 2 Ch. 100	416
Pellatt's Case	Law Rep. 2 Ch. 527	296, 306
Pell's Case	Law Rep. 5 Ch. 11	271, 350
Pemberton, Ex parte	2 D. M. & G. 960	484
Pennell *v.* Deffell	4 D. M. & G. 372	362
——— *v.* Reynolds	11 C. B. (N.S.) 709	579
Penny *v.* Avison	3 Jur. (N.S.) 62	238
Perry *v.* Truefitt	6 Beav. 66	158
Peruvian Railways Company, In re	Law Rep. 2 Ch. 617	360, 373
Petrie, Ex parte	Law Rep. 3 Ch. 232	178
Phillips *v.* Eastwood	Ll. & G. 270	34
Pickett *v.* Packham	Law Rep. 4 Ch. 190	532
Pidding *v.* How	8 Sim. 477	158
Pike *v.* Nicholas	Law Rep. 5 Ch. 251	285
Pilkington, Ex parte	Law Rep. 3 Ch. 404	222
——— *v.* Wignall	2 Madd. 240	341
Portland (Duke of) *v.* Topham	11 H. L. C. 32	207
Potts *v.* Warwick and Birmingham Canal Navigation Company	Kay, 142	417
Powles *v.* Hargreaves	3 D. M. & G. 430	777
Prendergast *v.* Turton	1 Y. & C. Ch. 98	83
Preston *v.* Wilson	5 Hare, 185	222
Prince of Wales Assurance Company *v.* Harding	E. B. & E. 183	292
Prosser, Ex parte	Buck. 77	329

R.

Ramsbotham *v.* Senior	Law Rep. 8 Eq. 575	704
Raphael *v.* Boehm	11 Ves. 102	238
——— *v.* Thames Valley Railway Company	Law Rep. 2 Ch. 147	417
Rawlings, Ex parte	1 D. J. & S. 225	328, 748
Reg. *v.* Lumley	Law Rep. 1 C. C. 196	142
Reid's Case	24 Beav. 318	300
Rex *v.* Inhabitants of Harborne	2 A. & E. 540	142
——— *v.* Inhabitants of Twyning	2 B. & A. 386	142
——— *v.* Pease	4 B. & Ad. 30	591
Rhodes *v.* Smethurst	4 M. & W. 42	236

		PAGE
Richardson *v.* Power	19 C. B. (N.S.) 780	245
———— *v.* Smallwood	Jac. 552	540
Riches *v.* Owen	Law Rep. 3 Ch. 820	221
Rigby *v.* Great Western Railway Company	2 Ph. 44	527
Roberts, Ex parte	3 D. F. & J. 747	488
Robinson *v.* Grey	9 East, 1	411
———— *v.* Wheelwright	6 D. M. & G. 535	209
Robinson's Case	Law Rep. 4 Ch. 322	491
———— Executors' Case	6 D. M. & G. 572	732
Rogers' Case	Law Rep. 3 Ch. 633	306
Rogers *v.* Waterhouse	4 Drew, 329	245
Rolfe *v.* Flower	Law Rep. 1 P. C. 27	127
—— *v.* Gregory	34 L. J. (Ch.) 274	78
Rose *v.* Watson	10 H. L. C. 672	416, 609
Rossi *v.* Bailey	Law Rep. 3 Q. B. 621	329, 402
Royal Bank of India's Case	Law Rep. 4 Ch. 352	448
Royal British Bank *v.* Turquand	6 E. & B. 327	292, 451
Rucker *v.* Scholefield	1 H. & M. 36	209
Russell *v.* East Anglian Railway Company	3 Mac. & G. 104	321
——— *v.* Plaice	18 Beav. 21	669
Ryland *v.* Smith	1 My. & Cr. 53	657

S.

Sadler *v.* Pratt	5 Sim. 632	209
St. Helen's Smelting Company *v.* Tipping	11 H. L. C. 642	461
Salisbury (Marquis of) *v.* Great Northern Railway Company	21 L. J. (Q. B.) 185; 16 Jur. 740	758
Sanderson *v.* Cockermouth and Workington Railway Company	11 Beav. 497	527
Saunder's Case	2 D. J. & S. 101	296
Savin, Ex parte	Law Rep. 1 Ch. 616	328
Scott *v.* Stanford	Law Rep. 3 Eq. 718	282
—— *v.* Tyler	2 Dick. 712	668
Sewell's Case	Law Rep. 3 Ch. 131	354
Shackleford's Case	Law Rep. 1 Ch. 567	306
Shaftesbury (Lady) *v.* Arrowsmith	4 Ves. 66	501
Sharp, Stewart, & Co., In re	Law Rep. 5 Eq. 155	407
Sheldon *v.* Weldman	1 Cas. C. 26	237
Sheppard *v.* Sheppard	32 Beav. 194	686
Shrewsbury (Earl of) *v.* Trappes	2 D. F. & J. 172	454
Shrubsole *v.* Sussams	16 C. B. (N.S.) 452	578
Sichell's Case	Law Rep. 3 Ch. 119	97
Sillick *v.* Booth	1 Y. & C. Ch. 117	143
Simpson's Case	Law Rep. 4 Ch. 184	306
Simpson *v.* Westminster Palace Hotel Company	8 H. L. C. 712	448
Sinclair *v.* Great Eastern Railway Company	21 L. T. (N.S.) 752	458
Skarf *v.* Soulby	1 Mac. & G. 364	540
Skelton *v.* Flanagan	Ir. Law Rep. 1 Eq. 362	209
Smith *v.* Green	1 Coll. 555	229
——— *v.* Pococke	2 Drew. 197	237
Snell's Case	Law Rep. 5 Ch. 22	351, 709
Somersetshire Canal Company *v.* Harcourt	2 De G. & J. 596	758
Southmolton (Mayor of) *v.* Attorney-General	5 H. L. C. 1	507
Spackman *v.* Evans	Law Rep. 3 H. L. 171	84, 297

		PAGE
Sparrow, Ex parte	2 D. M. & G. 907	578
Spencer *v.* Dennett	Law Rep. 1 Ex. 123	488
Spickernell *v.* Hotham	Kay, 669	77
Spirett *v.* Willows	3 D. J. & S. 293	539
Stace and Worth's Case	Law Rep. 4 Ch. 682	296
Stanford, Ex parte	1 Q. B. 886	329
Stanhope's Case	Law Rep. 1 Ch. 161	85
State Fire Insurance Company, In re	1 D. J. & S. 634	321, 425
Steele *v.* North Metropolitan Railway Company	Law Rep. 2 Ch. 237	677
Stelfox *v.* Sugden	Joh. 234	686
Stevens *v.* Olive	2 Bro. C. C. 90	540
——— *v.* South Devon Railway Company	13 Beav. 48	677
Stevens' Will, In re	Law Rep. 6 Eq. 597	29
Stewart's Case	Law Rep. 1 Ch. 511	83
Stocken's Case	Law Rep. 3 Ch. 412	64
Stokoe *v.* Cowan	29 Beav. 637	540
Stone *v.* Thomas	Law Rep. 5 Ch. 219	749
Straffon's Executors' Case	1 D. M. & G. 576	731
Stroud *v.* Norman	Kay, 313	208
Swabey *v.* Sutton	1 H. & M. 514	575
Swan, Ex parte	Law Rep. 6 Eq. 344	360
Symons *v.* George	34 L. J. (Ex.) 187; 3 H. & C. 996	748

T.

Tapling *v.* Jones	11 H. L. C. 290	165
Tasker *v.* Small	3 My. & Cr. 63	609
Tatam *v.* Williams	3 Hare, 347	83
Taylor, Ex parte	5 D. M. & G. 392	578
——— *v.* Horde	1 Burr. 60	199
———, In re	Law Rep. 4 Ch. 352	484
Teed *v.* Beere	5 Jur. (N.S.) 381	237
Teete's Case	12 W. R. 701	127
Thayer *v.* Lister	30 L. J. (Ch.) 427	659
Thetford School Case	8 Rep. 130 b.	506
Thomas, Ex parte	1 Atk. 73	178
——— *v.* Thomas	2 Dr. & Sm. 298	141
Thompson *v.* Advocate-General	12 Cl. & F. 1	375
——— *v.* Derham	1 Hare, 358	222
——— *v.* Knight	Law Rep. 2 Ex. 42	334
——— *v.* Perceval	5 B. & Ad. 925	127
——— *v.* Webster	4 De G. & J. 600; 7 Jur. (N.S.) 531; 9 W. R. 641	540
Thompson's Case	13 W. R. 958	306
Thomson *v.* Advocate-General	12 Cl. & F. 1	316
Thornhill *v.* Thornhill	2 Jac. & W. 347	555
Thorpe *v.* Goodall	17 Ves. 460	196
Times Life Assurance and Guarantee Company, In re	Law Rep. 5 Ch. 381	637
Tooth *v.* Hallett	Law Rep. 4 Ch. 242	609
Toovey *v.* Bassett	10 East, 460	410
Topham *v.* Duke of Portland	1 D. J. & S. 517	208
——— *v.* ———	1 D. J. & S. 603	454
Townsend *v.* Carus	3 Hare, 257	571
——— *v.* Westacott	2 Beav. 340	540

		PAGE
Trimingham *v.* Maud	Law Rep. 7 Eq. 201	775
Triston *v.* Hardey	14 Beav. 232	34
Tucker *v.* Tucker	13 Price, 607	208
Turquand *v.* Kirby	Law Rep. 4 Eq. 123	731
——— *v.* Marshall	Law Rep. 4 Ch. 376	769
Twort *v.* Twort	16 Ves. 128	181
Tyler *v.* Bell	2 My. & Cr. 89	316

U.

Underwood *v.* Wing	4 D. M. & G. 633; 8 H. L. C. 183	141
Union Bank of Calcutta, In re	3 De G. & Sm. 253	373

V.

Vansittart *v.* Vansittart	2 De G. & J. 249	337
Vezey *v.* Jamson	1 S. & S. 69	571
Vickers *v.* Vickers	Law Rep. 4 Eq. 529	651
Virany *v.* Warne	4 Esp. 47	458
Vogel, Ex parte	2 B. & A. 219	704
Vowles *v.* Young	9 Ves. 172	117

W.

Waddington *v.* Roberts	Law Rep. 3 Q. B. 579	748
Walford *v.* Walford	Law Rep. 3 Ch. 812	454
Walker *v.* Jones	Law Rep. 1 P. C. 50	435
——— *v.* Ware, Hadham, and Buntingford Railway Company	Law Rep. 1 Eq. 195	759
——— *v.* Woodward	1 Russ. 107	237
Wall *v.* Bright	1 Jac. & W. 494	609
Wallace *v.* Attorney-General	Law Rep. 1 Ch. 1	375
Walrond *v.* Walrond	Joh. 18	337
Walsh *v.* Wallinger	2 Russ. & My. 78	189
Ward, Ex parte	Law Rep. 3 Ex. 180	97
——— and Henry's Case	Law Rep. 2 Ch. 431	97
Ware *v.* Grand Junction Waterworks Company	2 Russ. & My. 470	677
——— *v.* Watson	7 D. M. & G. 248	245
Waring, Ex parte	19 Ves. 345	775
Warrant Finance Company's Case	Law Rep. 4 Ch. 643	87, 114
Waters *v.* Tompkins	2 C. M. & R. 723	458
Watney *v.* Wells	Law Rep. 2 Ch. 250	523
Watson *v.* Birch	2 Ves. 51	555
Webster, Ex parte	Law Rep. 2 Ch. 556	485
Wellesley *v.* Mornington	2 K. & J. 143; 1 Jur. (N.S.) 1202	53
Wells *v.* Hacon	5 B. & S. 196	333
Western Life Assurance Society, In re	Law Rep. 5 Ch. 396	599
Weston's Case	Law Rep. 4 Ch. 20	97, 563
Wey and Arun Junction Canal Company, In re	Law Rep. 4 Eq. 197	601
White *v.* St. Barbe	1 V. & B. 399	208
——— *v.* Wakley	26 Beav. 17	506
——— *v.* Wilson	14 Ves. 151	555

		PAGE
Wickham *v.* New Brunswick and Canada Railway Company	Law Rep. 1 P. C. 64	321
Wicks *v.* Scrivens	1 J. & H. 215	228
Wilde, Re	17 W. R. 368	328
Wilks *v.* Davis	3 Mer. 507	651
William's Case	1 H. & M. 672	127
Williams, Ex parte	11 Ves. 3	731
Williams *v.* Baily	Law Rep. 2 Eq. 731	337
——— *v.* Powell	15 Beav. 461	237
Wills *v.* Murray	4 Ex. 843	731
Wilson's Case	Law Rep. 8 Eq. 240	300
Wilson *v.* Wilson	1 H. L. C. 538; 5 H. L. C. 40	337
Winchester (Bishop of) *v.* Mid-Hants Railway Company	Law Rep. 5 Eq. 17	416
Wing *v.* Tottenham and Hampstead Junction Railway Company	Law Rep. 3 Ch. 740	416
Winter *v.* Innes	4 My. & Cr. 101	392
Wood *v.* Dunn	Law Rep. 1 Q. B. 77; Ibid. 2 Q. B. 73	779
——— *v.* Sutcliffe	2 Sim. (N.S.) 163; 16 Jur. 75	590
Woodburne *v.* Woodburne	5 De G. & Sm. 643	245
Woodburn's Will, Re	1 De G. & J. 333	98
Woodhouse *v.* Murray	Law Rep. 2 Q. B. 634	579
Woolston, Ex parte	3 M. D. & D. 702	484
Worcester Corn Exchange Company, In re	3 D. M. & G. 180	311
Worthington *v.* Wiginton	20 Beav. 67	304
Wright *v.* Atkyns	1 V. & B. 313	181
——— *v.* Wilkin	2 B. & S. 232	506
Wych *v.* East India Company	3 P. Wms. 309	77

X.

Xeres Wine Company, In re	Law Rep. 3 Ch. 769	91

Y.

Yates, Ex parte	Law Rep. 5 Ch. 1	519
——— *v.* Hambly	2 Atk. 360	533
——— *v.* Jack	Law Rep. 1 Ch. 295	165
Young *v.* Fernie	1 D. J. & S. 353	462
——— *v.* Robertson	4 Macq. 314	245

ORDER OF COURT.

1870

Friday, the 7th day of January, 1870.

The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable John, Lord Romilly, Master of the Rolls, The Right Honourable the Lord Justice, Sir George Markham Giffard, The Honourable the Vice-Chancellor, Sir John Stuart, The Honourable the Vice-Chancellor, Sir Richard Malins, and The Honourable the Vice-Chancellor, Sir William Milbourne James, Doth hereby, in pursuance and execution of the powers given to him by "The Debtors Act, 1869," and of all other powers and authorities enabling him in that behalf, Order and direct in manner following:—

I.—Indorsement on Decrees and Orders.

1. The 10th Rule of the 23rd of the Consolidated General Orders shall be varied, and as varied shall be as follows:—

Every Decree or Order made in any Suit or Matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the Decree or Order, within which the act is to be done; and upon the copy of the Decree or Order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.:—"If you, the within-named A. B., neglect to obey this Decree [or Order] by the time therein limited you will be liable to have your property sequestered for the purpose of compelling you to obey the same Decree [or Order], and you may also be liable to be arrested and committed to prison."

II.—Enforcing Decrees and Orders by Attachment, Serjeant-at-Arms, and Sequestration.

2. The 3rd Rule of the 29th of the Consolidated General Orders is hereby abrogated.

1870 3. Where any person is by a Decree or Order made in any Suit or Matter directed to pay money or costs in a limited time, and, after due service of such Decree or Order, refuses or neglects to make such payment according to the exigency of such Decree or Order, the person prosecuting such Decree or Order shall, at the expiration of the time limited for such payment, be entitled to a Commission of Sequestration, which may be issued by the Clerks of Records and Writs, without any special Order, upon production of evidence to the same effect as that which would heretofore have been required on issuing a Writ of Attachment for default in making such payment.

4. The form of subpœna for costs mentioned in Schedule E. to the Consolidated General Orders shall be varied by omitting therefrom the words "an attachment issuing against your person, and:" Provided always that where a subpœna is issued for costs payable under a Decree or Order, which states that payment thereof may be enforced by attachment, as mentioned in the 9th Rule of this Order, then the subpœna shall be in the form heretofore used.

5. Where any person is, by a Decree or Order made in any Suit or Matter, directed to pay costs, without a time being limited for such payment, and does not upon due service of a subpœna for such costs make such payment, the person to whom such costs are payable shall, immediately upon such default, be entitled to a Commission of Sequestration, which may be issued by the Clerks of Records and Writs without any special Order, upon production of evidence to the same effect as that which would heretofore have been required on issuing a Writ of Attachment for default in making such payment.

6. Where any person is by a Decree or Order made in any Suit or Matter directed to do any act other than or besides the payment of money or costs, and, after due service of such Decree or Order, refuses or neglects to do such act according to the exigency of the same Decree or Order, the person prosecuting such Decree or Order shall, at the expiration of the time limited for the performance thereof, be entitled to a Writ or Writs of

Attachment against the disobedient person. And in case such person shall be taken or detained in custody under any such Writ of Attachment without obeying the same Decree or Order, then the person prosecuting the same Decree or Order shall, upon the Sheriff's return that the disobedient person has been so taken or detained, be entitled to a Commission of Sequestration against his estate and effects. And in case the Sheriff shall make the return *non est inventus* to such Writ or Writs of Attachment, the person prosecuting such Decree or Order shall be entitled at his option, either to a Commission of Sequestration in the first instance, or otherwise to an Order for the Serjeant-at-Arms, and to such other process as he was formerly entitled to upon a return *non est inventus* made by the Commissioners named in a Commission of Rebellion issued for the non-performance of a Decree or Order.

7. Where, by any Decree or Order, a trustee or person acting in a fiduciary capacity is ordered to pay in a limited time any sum of money in his possession or under his control, or a solicitor is ordered to pay in a limited time costs for misconduct as such solicitor, or to pay in a limited time a sum of money in his character of an officer of the Court, and such trustee, person, or solicitor, after due service of such Decree or Order, neglects or refuses to pay such money or costs according to the exigency of such Decree or Order, the person prosecuting such Decree or Order shall, at the expiration of the time limited thereby for the performance thereof, be entitled at his option either to a Commission of Sequestration to be obtained in manner provided by the 3rd Rule of this Order, or (subject nevertheless as mentioned in Rule 9) to the remedies to which under the 6th Rule of this Order he would have been entitled in the case of failure to do some act directed by the Decree or Order other than payment of money.

8. Where, by any Decree or Order, a solicitor is ordered to pay costs for misconduct as such solicitor, without a time being limited for such payment, and does not, upon due service of a subpœna for such costs, make such payment, the person to whom

1870 such costs are payable shall, immediately upon such default, be entitled, at his option, either to a Commission of Sequestration to be obtained in manner provided by the 5th Rule of this Order, or (subject nevertheless as mentioned in the next following Rule), to a Writ or Writs of Attachment and such other process as has heretofore been applicable in case of non-payment of costs recoverable by subpœna.

9. Any Decree or Order directing any such trustee person or solicitor as mentioned in the last two preceding Rules to make any such payment as in the same Rules mentioned, shall state that such payment may be enforced by attachment,(1) and unless the Decree or Order contains such statement, no attachment shall be issued for enforcing such payment without leave of the Court or the Judge in Chambers, to be applied for by motion or summons, which application may be granted *ex parte*, upon the Court or Judge being satisfied that the case comes within the exceptions contained in the 4th section of "The Debtors Act, 1869," unless the Court or Judge thinks fit to require notice of such application to be served. (2)

III.—COMMITTAL TO PRISON, UNDER SECT. 5 OF "THE DEBTORS ACT, 1869."

10. Every application to commit to prison under the 5th section of "The Debtors Act, 1869," shall be made by motion on notice, and the practice applicable to motions to commit for breach of an injunction shall, so far as the same is not inconsistent with the said Act or with anything in these Rules, be applicable to such applications. (2)

11. The Court, upon the hearing of any such application, may, if it shall see fit so to do, instead of refusing or granting the application, adjourn the same, and either give leave to adduce further evidence, or direct an inquiry in Chambers, as to the means of the person making default, or require the production and oral examination before itself of the person making default and any persons who have given evidence against or in support of the application, or of such of them as the Court may think fit, in the

(1) Order agst [illegible] to be indorsed with notice that it might be enforced by attachment. Pegler v. [illegible]
Turner [illegible]
(2) See (2) opposite p.

same manner as such production and oral examination might be required at the hearing of a cause. (2)

12. In case any such inquiry as aforesaid shall be directed, the general course of proceeding and practice at the Judge's Chambers, as provided by Statute 15 & 16 Victoria, c. 80, and the General Orders of the Court relative thereto, shall apply to all proceedings under such inquiry.

13. The Court, in making an Order for committal to prison under the said 5th section, may either make such imprisonment determinable on payment of the whole sum in respect of which the person to be imprisoned is in default, together with such costs as the Court shall think fit, or may order the debt to be paid by such instalments as the Court shall think fit, and make the imprisonment determinable on payment of such costs, and such of the said instalments as the Court shall think fit, and in either of such cases the Court, if it shall think fit, may direct payment of a sum in gross in lieu of taxed costs.

14. No application made under the said 5th section, nor any Order made thereon, shall in any manner vary or suspend any of the remedies which the person prosecuting the Decree or Order which has been disobeyed, would, if no such application had been made, have been entitled to against the property of the person disobeying the same Decree or Order, but the person prosecuting such Decree or Order may proceed to avail himself of such remedies without any regard to such application, or to any Order made thereon, except so far as by consent, he may, by such last-mentioned Order, be expressly restrained from availing himself of such remedies.

15. Orders of committal may be in the form A. 1, or A. 2, in the Schedule hereto, as the case may be, with such variations as the circumstances of the case may require, and an office copy of each such Order shall be delivered to the Sheriff or other Officer required to execute the same. Office copies of any such Order may be delivered concurrently to different Sheriffs for execution in different counties. Every such office copy as aforesaid shall be

See Evans v Bean LR 10 Ch 76 L.J. [illegible] of the
se is within the Act is a matter of [illegible]

1870 indorsed by the Clerks of Records and Writs, with the direction of the Sheriff or other officer by whom the same is to be executed. The Sheriff and Officer shall be entitled to the same fees in respect of an Order of committal, as are now payable upon a writ of *capias ad satisfaciendum,* issued out of Her Majesty's Courts of Common Law.

16. The Sheriff or other Officer to whom an Order of Committal is directed as aforesaid, shall, within two days after the arrest, indorse upon the office copy of the Order delivered to him the true date of such arrest, and return the same so indorsed to the Solicitor of the person prosecuting the Decree or Order, or to such person himself, if he acts in person.

17. Upon payment of the sum or sums in that behalf mentioned in the Order of Committal, including the Sheriff's fees, and the costs or gross sum in lieu of costs made payable by the Order, the person committed shall be entitled to a Certificate in the form B. in the Schedule hereto, or to the like effect, signed by the Solicitor of the person prosecuting the Decree or Order which has been disobeyed, or if such person be acting in person, then signed by him, and attested by a Solicitor or Justice of the Peace.

18. In case any Order is made under the 5th section of the said Act for payment of a sum of money by instalments, and the person imprisoned shall, after his discharge from prison, neglect or refuse to pay the subsequent instalments, or any of them, the person prosecuting the Decree or Order for disobedience to which the committal was ordered, shall, in addition to his remedies against the property of the person making default, be entitled to enforce payment of such subsequent instalments by attachment, as in the case of disobedience to an Order directing the performance of some act other than payment of money.

IV.—Miscellaneous.

19. The general practice of the Court shall, in all cases not provided for by "The Debtors Act, 1869," or these Rules, and so far as the same is applicable, and not inconsistent with the said Act

or these Rules, apply to all proceedings under the 4th and 5th sections of the said Act.

20. The charges to be allowed to Solicitors for duties performed in respect of such proceedings as last aforesaid, and the fees of Court in respect of the same proceedings, shall be the same as those allowable and payable in respect of other proceedings of the same nature in the causes or matters in which such proceedings respectively are taken.

21. This Order shall be read and construed as part of the General Consolidated Orders of the Court, and the interpretation clause in the same Consolidated General Orders contained shall apply to the Rules of this Order.

22. This Order shall come into operation on the 11th day of January, 1870.

SCHEDULE.

A. 1.

Upon motion, &c., this Court doth Order that the said A. B. do pay to the said [the sum of £ , as and for] his costs of and incident to this application and this Order, and further that the said A. B., for default in payment of the sum of £ mentioned in the said Decree [*or*, Order] of the day of , 18 , be committed to prison for the term of six weeks from the date of his arrest, including the day of such date, unless he shall sooner pay the said sum of £ , and Sheriff's fees for the execution of this Order, and the costs hereinbefore directed to be paid [*or*, and the said sum of £ for costs]. And it is ordered that any Sheriff or officer to whom an office copy of this Order shall be delivered, after being directed to him by the Clerks of Records and Writs, do take the said A. B. for the purpose aforesaid if he be found within his bailiwick.

1870

A. 2.

Upon motion, &c., this Court doth Order that the said A. B. do pay to the said [the sum of £ , as and for] his costs of and incident to this application and this Order, and further that the said A. B., for default in payment of the sum of £ mentioned in the said Decree [*or*, Order] of the day of , 18 , be committed to prison for the term of six weeks from the date of his arrest, including the day of such date, unless he shall sooner pay the Sheriff's fees for the execution of this Order and the costs hereinbefore directed to be paid [*or*, and the sum of £ hereinbefore directed to be paid for costs], and the sum of £ , part of the said sum of £ . And it is Ordered that the said A. B. do pay [*state to whom or to what account to be paid*] the sum of £ , the residue of the said sum of £ , by equal instalments on [*state times of payment*]. And it is Ordered that any Sheriff or officer to whom an office copy of this Order shall be delivered, after being directed to him by the Clerks of Records and Writs, do take the said A. B. for the purpose aforesaid, if he be found within his bailiwick. (a)

B.

A. *v.* B.

[*or*, In the Matter of .]

I certify that A. B., now in the Gaol of , upon an Order of the High Court of Chancery, dated the day of , 18 , made in the above Cause [*or*, Matter] until payment of £ , has paid the said sum, together with the [the sum of £ for] costs mentioned in the said Order, and Sheriff's fees.

Hatherley, C.
Romilly, M.R.
G. M. Giffard, L.J.
J. Stuart, V.C.
R. Malins, V.C.
W. M. James, V.C.

(a) Re Mercantile Credit Association, Lewis's Case
[illegible]

ORDERS IN LUNACY.

1870

Monday, the 10th day of January, 1870.

I, WILLIAM PAGE BARON HATHERLEY, Lord High Chancellor of Great Britain, entrusted by virtue of Her Majesty the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do, with the advice and assistance of The Right Honourable SIR GEORGE MARKHAM GIFFARD, Lord Justice of the Court of Appeal in Chancery, also being entrusted as aforesaid, and by virtue, and in exercise of the powers or authorities in this behalf vested in me by "The Lunacy Regulation Act, 1853," and "The Courts of Justice (Salaries and Funds) Act, 1869," and of every other power or authority in anywise enabling me in this behalf, Order as follows:—

1. The 29th of the General Orders in Lunacy, dated the 7th day of November, 1853, is hereby discharged, and the following Orders shall be deemed to be incorporated with the said General Orders in the place of the said Order hereby discharged, and shall be read and construed as part of such Orders, and the interpretation clause contained in such Orders, shall be applicable to these Orders.

2. The Masters in Lunacy may from time to time in such cases as they may think fit, certify that the whole or any part of the per-centage payable under the Lunacy Regulation Act, 1853, is to be paid out of cash arising from dividends of the Lunatic that may be standing to the credit of the matter of any lunacy, either generally or to any particular account, and when any such certificate is made, the amount certified thereby shall not be paid by means of stamps, but shall be carried over and transferred in manner hereinafter directed.

Discharged as from 1 Feb 1883. Orders in Lunacy
Feb 1883 ([illegible] (1883) Pt 4 80)

1870

3. In each of the divisions of the Accountant-General's Office there shall henceforth be kept an account, intituled, "The Paymaster-General's Lunacy Per-centage Account."

4. When any such Certificate as hereinbefore mentioned is made, an Office Copy of such Certificate is to be left at the Office of the Accountant-General, and the Accountant-General is, by virtue of such certificate when so left, out of such cash as is mentioned in the Second of these Orders, to carry over the amount mentioned in such certificate from the credit of the account in such certificate in that behalf mentioned to the credit of the Paymaster-General's Lunacy Per-centage Account, in that division of his Office in which the account is kept, to the credit of which such cash shall be standing, and any Orders made and to be made in any such matters respectively, are to be subject to this Order, and to be acted upon by the Accountant-General accordingly.

5. As soon as conveniently may be after the 31st day of January, the 30th day of April, the 31st day of July, and the 31st day of October, in each year, upon receiving from the Paymaster-General's Office a direction to the Governor and Company of the Bank of England to credit the account in their books of Her Majesty's Paymaster-General "Cash Account" with the amount of cash standing on those days respectively on the credit of the said Account, in each of the divisions of the Accountant-General's Office, intituled, "The Paymaster-General's Lunacy Per-centage Account," the Accountant-General shall, by certificate under his hand, direct the Governor and Company of the said Bank to transfer from his Account the amount so expressed in such direction to such cash account of the Paymaster-General accordingly, and such certificate of the Accountant-General shall be a good and sufficient authority to the said Bank to write off the amount therein-mentioned from the account of the Accountant-General, and to carry it to the account of the Paymaster-General "Cash Account" as aforesaid, without any further Order of the Court, and upon receiving from the said Bank a certificate that such transfer from the account of the Accountant-General to the account

of the Paymaster-General has been effected, the Accountant-General is to cause the amount so transferred to be placed to the debit of the proper account in his books. 1870

6. These Orders shall take effect from the 11th day of January, 1870, and Order 2 shall be deemed to operate as from the 1st day of October last, except so far as relates to such per-centage (if any) as may since that day have been paid by means of stamps.

Hatherley, C.
G. M. Giffard, L.J.

1870

ORDER OF COURT.

brogated by Chan Funds
mdd Act 1874 no 3

Monday, the 10th day of January, 1870.

N(73)1875.21

Abrogated
Chan Funds
Consolidated
Rules 1874 no 3
R 9 Ch xxxi
Republished
as altered
Chan Funds
Consold Rules
1874 no 14
R 9 Ch xxxiv

The Right Honourable William Page Baron Hatherley, Lord High Chancellor of Great Britain, Doth hereby, in pursuance and execution of all powers and authorities enabling him in that behalf, Order and direct in manner following:—

1. Every ~~Decree or~~ Order ~~whereby it is intended to~~ providing for payment out of ~~a Fund~~ may or the proceeds or secs in Court of any duty payable ~~to the Revenue~~ under the Acts relating to Legacy or Succession Duty, shall direct that the amount of such Duty shall (upon ~~such~~ the requisition of the Commrs of Inland Revenue ~~as hereinafter mentioned~~), be transferred ~~in manner hereinafter provided~~, to the Account ~~of the Public Moneys~~ of the Receiver General of Inland Revenue, at the Bank ~~of England~~.

Abrogated
as above
Republished
as altered Revd
by de pt N
no 57.
R 9 Ch liii

57 ~~2~~. When any ~~Decree or~~ Order ~~containing any such direction as last aforesaid~~ shall have been left at the Chancery Pay Office ~~of the Accountant-General~~, for the purpose of ~~having such~~ giving effect to any direction ~~carried into effect,~~ for the transfer of such duty to the account of the ~~the Accountant-General upon receiving from the Commissioners~~ Agent at the Bank together with of Inland Revenue ~~a~~ requisition ~~showing the amount at which such duty has been assessed, and requesting the~~ of the Commrs of Inland Revenue for such transfer ~~thereof to the Revenue, shall by Certificate under his hand direct the~~ and such other order as may be necy for verifying the amount of such duty, the Chy Paymaster shall direct ~~Governor and Company of~~ the Bank ~~of England~~ to transfer the amount of such Duty ~~from his Account~~ to the said Account ~~of the Public Moneys of the Receiver-General of Inland Revenue at the Bank of England~~. and shall debit such amount to the proper acct in the books of the Chy Pay Office

Abrogated
as above

3. Such Certificate as last aforesaid shall be a sufficient authority to the said Bank to write off the amount therein mentioned from the Account of the Accountant-General, and to place it to the Account of the Public Moneys of the Receiver-General of Inland Revenue.

Abrogated
as above

4. The Accountant-General, upon receiving from the said Bank a Certificate that such transfer as aforesaid from his Account to

1870

the Account of the Public Moneys of the Receiver-General of Inland Revenue has been effected, shall cause the amount so transferred to be placed to the debit of the proper Account in his Books.

Abrogate
see officia

5. This Order shall be read and construed as part of the Consolidated General Orders of the Court, and the Interpretation Clause in those orders contained shall apply to this Order.

6. This Order shall come into operation on the 11th day of this present month of January, 1870.

Hatherley, C.

1870

ORDER OF COURT.

Abrogated by Chan Funds Amended Rule 1872 No 3

[illegible] 21

Abrogated, Chan Funds Consold Rules 1874 no 3. LR 9 Ch xxx

Monday, the 17*th day of January*, 1870.

THE RIGHT HONOURABLE WILLIAM PAGE BARON HATHERLEY, Lord High Chancellor of Great Britain, by and with the advice, consent, and assistance of The Right Honourable JOHN, LORD ROMILLY, Master of the Rolls, The Right Honourable the Lord Justice, SIR GEORGE MARKHAM GIFFARD, The Honourable the Vice-Chancellor, SIR JOHN STUART, The Honourable the Vice-Chancellor, SIR RICHARD MALINS, and The Honourable the Vice-Chancellor, SIR WILLIAM MILBOURNE JAMES, Doth hereby, in exercise of the power given to him by "The Courts of Justice (Salaries and Funds) Act, 1869," and of all other powers and authorities enabling him in that behalf, Order and direct in manner following:—

1. Rule 8 of the 39th of the Consolidated General Orders, and the 8th of the General Orders of the 25th day of October, 1852, are hereby abrogated, and the following Rules shall be deemed to be incorporated with the said Consolidated Orders, in the place of the said Rule, and shall be read as part of such Orders, and the interpretation clause in such Orders contained shall apply to these Rules.

Republished 58 as altered Chan Funds Consold Rules 1874 No 58 LR 9 Ch lii

2. When costs are directed to be paid out of ~~a fund~~ money in Court, or out of the proceeds of securities in Ct ~~the fees of taxation shall not be payable by means of stamps, but shall be carried over and transferred in manner hereinafter provided, and to that intent~~ the Taxing Master shall ~~in such cases~~ certify the amount of ~~such~~ the fees of taxation payable in respect of such costs unless he shall certify that such fees are included in the costs as taxed

~~3. In each of the divisions of the Accountant-General's Off~~ice an account shall from henceforth be kept, intituled "The Paymaster-General's Fees of Taxation Account;" and when any such ~~Certificate, as is mentioned in the preceding Rule, is left at the Office of the Accountant-General, to be acted on,~~ the Chancery Paymaster shall carry over the amount of Fees certified to be payable ~~thereby shall be carried over~~ from the amount to ~~Fund out of~~ which th~~e costs are directed to be paid to the last-mentioned~~ such money or proceeds are placed to a sep account in the books of the Chy Pay Off for fees of taxation & the amount so carried over shall from time to time as the Treasury may direct be paid to the account of Her Majesty's [illegible]"

1870

Account in that division of the Accountant-General's Office in which the Account, to the credit of which such Fund shall be standing, is kept.

4. As soon as conveniently may be after the 31st day of January, the 30th day of April, the 31st day of July, and the 31st day of October in each year, upon receiving from the Paymaster-General's Office a direction to the Governor and Company of the Bank of England to credit the Account in their Books of Her Majesty's Paymaster-General "Cash Account," with the amount of cash standing on those days respectively on the credit of the said Account in each of the divisions of the Accountant-General's Office, intituled "The Paymaster-General's Fees of Taxation Account," the Accountant-General shall, by certificate under his hand, direct the Governor and Company of the said Bank to transfer from his Account the amount so expressed in such direction to such Cash Account of the Paymaster-General accordingly, and such Certificate of the Accountant-General shall be a good and sufficient authority to the said Bank to write off the amount therein mentioned from the Account of the Accountant-General, and to place it to the Account of the Paymaster-General "Cash Account" as aforesaid, without any further Order of this Court, and upon receiving from the said Bank a Certificate that such transfer from the Account of the Accountant-General to the Account of the Paymaster-General has been effected, the Accountant-General is to cause the amounts so transferred to be placed to the debit of the proper Account in his Books.

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5. This Order shall come into operation on the 21st day of January, 1870, and Rule 2 shall be deemed to take effect as from the 1st day of October last, except as regards such Fees of Taxation (if any) as may have been paid by means of stamps since that day.

HATHERLEY, C.
ROMILLY, M.R.
G. M. GIFFARD, L.J.
J. STUART, V.C.
R. MALINS, V.C.
W. M. JAMES, V.C.

Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

Ex parte YATES.

L. C.
1869
Nov. 3; Dec. 8.

Patent—Similar Invention—Practice—Reference to Law Officer.

Where the sealing of a patent is objected to on the ground that the invention is a colourable imitation of one which is the subject of an existing patent, a reference will be made to the Law Officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for.

Post 574
6 Ch 275.

On the 5th of April, 1869, one *Fletcher* applied for a patent for an improvement in furnaces, and his patent was sealed on the 2nd of October. On the 2nd of June *Yates* applied for a patent for an invention having the same object, and obtained provisional protection, which was duly advertised. On the 2nd of July *Yates* gave notice of his intention to proceed, and on the 25th of August a warrant was made for the great seal to be affixed to his patent. *Fletcher* then gave notice of objection to the sealing of *Yates's* patent, on the ground that the alleged invention was not new, and was a mere evasion or colourable imitation of the invention for which *Fletcher* had a patent. *Yates* now applied to have the seal affixed to his patent.

Mr. *Macrory*, in support of the application.

L. C.
1869
Ex parte
YATES.

Mr. *T. Aston* opposed, and said that where there was an objection the practice was to refer the question to the Law Officer: *Ex parte Bates and Redgate* (1).

Mr. *Macrory*, in reply, said that the Law Officer would not go into the question at this stage of the proceedings, and could not decide it unless the two inventions were identical. There was no allegation of any fraud by *Yates*, and *Fletcher* might have seen, from the notice of the patent in the *Gazette*, that such a patent had been applied for, and he should have objected before the Law Officer. It was now too late: *In re Mitchell's Patent* (2).

Lord Hatherley, L.C., said, that if the opposition was utterly frivolous he would dispose of the application at once; but in a case like this, where one patent had been actually sealed, and another was applied for, the matter could not be so disposed of. Whatever might have been said as to any particular case, his Lordship could not see that the mere application for a patent was sufficient to put every other patentee on his guard, and compel him to move at once before the Law Officer. There was great inconvenience in having two patents for the same invention in existence at the same time, both to the patentees and to the public. This Petition must stand over, and it must be referred to the Law Officer to say whether, having regard to the prior patent, the present application ought to be granted. As to the costs of the reference, they would probably be borne by the party who was proved to be in the wrong.

Dec. 8. The Law Officer having reported against the application, the Petition was dismissed with costs.

Solicitors: Mr. *Bristow Hunt*; Mr. *Wynne*.

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(1) Law Rep. 4 Ch. 577.

(2) Law Rep. 2 Ch. 343.

RUSHBROOK *v.* LAWRENCE.

L. C.
1869
Nov. 16.

Mortgagor—Agreement—Redemption.

Where a mortgagor had executed an agreement to deliver up possession of the mortgaged property, and to release all his interest to the mortgagee, and the agreement was not acted upon for twelve years, when the property was sold:—

Held, that under the circumstances the mortgagor was entitled to the surplus of the purchase-money.

Decree of the Master of the Rolls affirmed.

THIS was a suit by a mortgagor against a mortgagee for an account of the proceeds of the sale of the mortgaged property. The mortgagee, in opposition to the claim, contended that the equity of redemption had been released to him.

The Master of the Rolls made a decree for an account, as reported (1), where the facts are fully stated.

The Defendant appealed.

Sir *R. Baggallay*, Q.C., and Mr. *G. N. Colt*, for the Appellant.

Mr. *Southgate*, Q.C., and Mr. *Rigby*, for the Plaintiff, were not called upon.

LORD HATHERLEY, L.C., said that the Defendant had remained a mortgagee throughout, and had sold the property as a mortgagee. The agreement which had been relied upon by the Defendant only related to giving up possession, and to joining in any conveyance on a sale, and was not a release of the equity of redemption; if any other construction was put upon that document there would be great difficulty in supporting it under the circumstances. In fact, it had never been acted upon for twelve years. Now, there had been a sale, and the Plaintiff was entitled to any surplus. The appeal must be dismissed with costs.

Solicitors: Messrs. *Stanford & Anderson;* Messrs. *Kingsford & Dorman.*

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(1) Law Rep. 8 Eq. 25.

L. C.
and L. J. G.
1869
Nov. 4.

LAING *v.* REED.

Building Societies Act (6 & 7 *Will.* 4, c. 32)—*Legality of Rule—Power to borrow.*

Port 311, 2

A rule empowering the trustees of a building society to borrow a limited amount of money for the purposes of the society is not illegal under the *Building Societies Act.*

The certificate of the Barrister appointed to certify rules under the *Building Societies Act* is not conclusive as to the legality of a rule.

9 Eq 608, 611, -2, -4, -6, -8
6 Ch 816
— 859
12 Eq 519
523
10 ChD 613
5 CPD 335
336
6 QBD 703
704
18 ChD 178
22 ChD 65–
68
23 ChD 440
454, -6

THE bill in this case was filed by *T. H. Laing*, on behalf of himself and all other the shareholders of the *Northern Counties Permanent Benefit Building Society*, except such of the said shareholders as were Defendants, against the three trustees of the society, and stated as follows:—That on the 6th of January, 1851, the society was established at *Newcastle-on-Tyne* as a benefit building society, under the provisions of the Act, 6 & 7 Will. 4, c. 32: That rules for carrying into effect the objects of the society were made and certified by the Barrister-at-law appointed to certify rules of savings banks, and contained the following articles:—

"I. That its object is for raising, by the weekly contributions of the members, a stock or fund, to enable each of them to erect or purchase a dwelling-house, or dwelling-houses, or other real or leasehold property."

"XVIII. That the trustees for the time being may from time to time, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person, to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received."

"That the total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance or advances may be required."

That the Plaintiff, on the 16th of January, 1869, became a member of the society, and was the holder of one share therein: That the Defendants had from time to time, under the alleged authority of the 18th rule, borrowed sums of money amounting to £66,362, and had secured the repayment of the sums so borrowed by giving to the lenders promissory notes carrying interest at 5 per cent. per annum: That the 18th rule of the society was illegal and invalid, and that the borrowing money on behalf of the society was beyond the powers of and a breach of trust on the part of the Defendants as trustees: That payment of interest as aforesaid was a misappropriation of the funds of the society, and a breach of trust, for which the Defendants were liable. And the bill prayed a declaration that the 18th rule of the society was absolutely illegal and invalid, and that the Defendants might be restrained from borrowing any money on behalf of the society, and from paying out of the assets of the society any interest on money already borrowed.

To this bill the Defendants demurred. The Vice-Chancellor *Malins*, before whom the demurrer came, appeared to be of opinion that the rule in question was illegal, but he thought that the question ought to be decided at the hearing of the cause, and over-ruled the demurrer.

The Defendants appealed. It was stated at the Bar that a similar rule was at one time very generally inserted in the rules of building societies, and allowed by the Barrister appointed to certify, but in 1857 the Barrister appointed to certify had been advised that such a rule was contrary to the *Building Societies Act*, and since that time he had refused to certify that such a rule was in conformity to law, so as to make the rule binding, as required by the Acts 6 & 7 Will. 4, c. 32, and 4 & 5 Will. 4, c. 40.

Sir *Roundell Palmer*, Q.C., and Mr. *Chitty* (Mr. *Osborne*, Q.C., with them), for the Defendants, the Appellants:—

It is admitted that there is nothing in the Act expressly prohibiting a building society from borrowing money, and why should such a provision be imported. There is nothing wrong or illegal in borrowing, and it is clearly conducive to the benefit of the society that they should have power to do so. *Mullock* v. *Jenkins* (1) shews the principles on which the Court will decide as to what is repugnant to the Act. The question in *Armitage* v. *Walker* (1) was quite different. As to the certificate of the Barrister, we do not contend that it would render valid anything absolutely illegal or forbidden by the Act, but in a matter of regulation like this, or where there is any doubt, it will be conclusive: *Dewhurst* v. *Clarkson* (2). Even if the rule was held to be illegal and contrary to the statute, the only result would be that this society would not be a benefit building society under the Act.

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(1) 14 Beav. 628.

Mr. *Glasse*, Q.C., and Mr. *Hastings*, for the bill:—

The objects of building societies, as defined by the Act, are to make a profit by raising money from the members and lending it, not by borrowing, which will destroy one source of profit; for where there is a limited sum, competition amongst the members for the advances will give an increased profit, but when they know the sum may be increased without limit there will be no competition, and, moreover, the interest which must be paid for the money borrowed will be a loss to the funds of the society. *In re Kent Benefit Building Society* (3), and *Dobinson* v. *Hawks* (4), shew how strictly the Acts have been interpreted We do not say that this rule is contrary to the general law, but it is repugnant to this particular Act, though borrowing may not be expressly prohibited by the Act. Whether it is for the benefit of the society is not the question, but whether it is not repugnant to the Act under which the society is formed.

Lord Hatherley, L.C.:—

We think that the demurrer in this case ought to have been allowed; and we feel it to be a matter of satisfaction that the learned Judge before whom the case originally came has not, in fact, pronounced any decided opinion upon the point which we are about to determine, namely, whether or not the rule in question and, of course, the proceedings under that rule, are in conformity with the Act of Parliament by which this society is constituted. The learned Judge has rather reserved his opinion upon that point as being doubtful, and has preferred the course of allowing the suit to pro-

(1) 2 K. & J. 211. 2 Jur N.S. 13
(2) 3 E. & B. 194. 18 Jur 693
(3) 1 Dr. & Sm. 417. 7 Jur N.S. 10
(4) 16 Sim. 407.

ceed, so that an answer might be put in, and that he might be more acquainted with all the facts of the case. But this bill has been filed for the express purpose of obtaining the judgment of the Court upon the point of law; the circumstances appear to be fairly and properly stated with a view to obtain the decision of the Court upon the subject, and we see no need for reserving our judgment until the hearing.

What the bill complains of is this: That the Defendants, being a building society bound, of course, by the terms of the Act of Parliament which constitutes such societies, have made a rule that money may be borrowed by the trustees of the society, and that this money may be dealt with as part of the funds of the society, and may be applied in making advances to those who are desirous of having advances according to the rules of the society. And the bill charges that this power of borrowing is a power inconsistent with the scope and purview of the Act of Parliament regulating building societies, though it may not be prohibited by the express language of the Act.

The bill expressly avers that the moneys so borrowed have been applied to the purposes of the society, and does not aver that there has been any excess in the exercise of the power conferred, only averring that the power is not legitimate.

In support of the validity of the rule two arguments have been urged by the Appellants. First, that the rule itself is not *ultrà vires*, regard being had to the Act; and, secondly, that if there be a doubt upon that subject—for so I understand the argument, and it can hardly be put higher—the certificate of the Barrister should be taken by us as conclusive.

We cannot adopt as possible, in the particular case before us, any view of the certificate of the Barrister which would render it conclusive. It could not be contended, and it hardly was contended, that if the matter was plainly *ultrà vires*, any certificate of the Barrister could prevent the Court from interfering so as to prevent an abuse of power on the part of persons who have certain privileges conferred on them by Parliament. If there were such an abuse of power the certificate of the Barrister would have no effect whatever. The words which render him competent to decide upon the legality of the instruments submitted to him, clearly do not apply to such a case as that before us. They probably apply to regulations affecting the engagements between the members themselves; such, for instance, as in what cases the majority might bind the minority. But if the law prohibited the raising of these sums of money, I apprehend that no certificate of the Barrister could avail.

Then comes the second question, whether the Act of Parliament does, in fact, forbid any such arrangement as has been made. If the rule had authorized the trustees to raise an unlimited sum of money wholly regardless of the contributions which might be made by its members, that, no doubt, would be contrary to the intent and scope of the Act. The Act states that the moneys shall be raised, first, by weekly contributions of the members; secondly, by fines; and, thirdly, by the payments of those who are desirous of acquiring land. If there is only a small amount of money in hand, and there are several persons desirous of having an advance, they may be disposed to pay a high rate of interest, or pay something down in the shape of bonus; and that, of course, would fall into, and form part of, the society's funds.

Then comes the question, the society having these funds, are they or are they not to be allowed to manage them in such a way as they may think best and most conducive to their own interest. If we consider the question of investing instead of borrowing, there is nothing in the Act of Parliament expressly relating to investing; but it is clear that they may invest, because there is a prohibition against investing in savings banks, and that is just one of the things, as I apprehend, which are left to them to frame rules about, and the Barrister is to certify as to whether the rules that they make with regard to investment are reasonable and proper. Then, if they have power to invest, and have invested their money, it might be injurious and inconvenient for the society to dispose of those investments just at the time when members required advances. Their investments might be in the funds, and the funds might be so low as to make it inexpedient to sell out at that time, and the natural course would be to procure the money elsewhere. For at that time they would probably obtain a high rate of interest, not being bound by the usury laws, whilst they would not pay more than 5 per cent. for what they might borrow.

To say that this rule is injurious to the society is nothing to the purpose, when the society frames its own rules. They are the best judges of that. The whole body frames the rules, and each man judges for himself, and the rules are carried by a majority, and are submitted to the Barrister. They consider it most advantageous to deal with the funds by investing on the one hand, and borrowing on the other, provided always that the borrowing is only to be exercised to the extent originally contemplated in the formation of the society, namely, two-thirds of the amount that may be outstanding upon mortgages, which mortgages are granted under the provisions of the Act.

If an advance were wanted when they had not money in hand, might they not obtain the sum required by overdrawing their account at the bankers? Would anybody say that that would be an irregular course, provided always that the borrowing did not exceed the proper amount? It seems to me, therefore, that if the Vice-Chancellor had given his mind fully to the construction of the Act, he would, in all probability, have come to the same conclusion as ourselves, namely, that the rule complained of is not in itself in excess of the power, and that there is nothing in the bill before us—which appears to represent all the facts required for the purpose of obtaining the decision of the Court—which can raise any reasonable ground for relief against the Defendants. Upon the point of law our decision is adverse to the Plaintiff, and we think that the demurrer ought to be allowed, and the usual consequences follow. There will be no costs of the appeal.

SIR G. M. GIFFARD, L.J.:—

I think this is a case which clearly ought to be decided on demurrer, and for this reason, that the whole case in the bill raises one simple question, as to the effect of a particular rule. There is no allegation in the bill that the money borrowed exceeds the amount which might be raised under the rules, nor is there any allegation that the amount has been raised otherwise than for the purposes of the society. I quite agree with the Vice-Chancellor that the certificate is not conclusive where the rule is either contrary to the general law, or repugnant to the express provisions of the Act; and I take it that the rule would be repugnant to the

L. C. and L. J. G.
1869
LAING v. REED.

express provisions of the Act if it had been a rule which had made the society a thing different from that which is specified in the Act and meant by the Act; if, for instance, it had made the society an insurance society, or a discount society, or a bank, then I think it would be repugnant to the Act, and the certificate would not be conclusive.

But what we really have to inquire on the present occasion is this: First of all, is there any special provision in the Act forbidding this borrowing? The answer is, no, there is no such provision. Then, secondly, does this rule merely provide a method of conducting business? or is it a rule making the society a thing different from a benefit building society? In my opinion, it is not a rule making the society a thing different from a benefit building society, but it is merely a rule laying down a mode of conducting the business of the society which the members have thought fit. That being so, I think the demurrer should be allowed.

Solicitor for the Plaintiff: Mr. *J. Tucker*.

Solicitors for the Defendants: Messrs. *Shum & Crossman*.

In re HEYFORD COMPANY.

PELL'S CASE.

L. J. G.
1869
Nov. 3.

Company—Subscriber of Memorandum—Allotment of paid-up Shares.

P. subscribed the memorandum of association of a company for 1350 shares. By the articles it was stated that the company would issue 1500 shares to *P.*, which were to be credited as fully paid-up shares, and that *P.* would accept them as the purchase-money of the good will and stock in trade of a business which *P.* had sold to the company. 1350 fully paid-up shares were allotted to *P.*, and 150 to his nominees. No money was paid for the shares. The company was afterwards wound up:—

Held (reversing the decision of the Master of the Rolls), that *P.* was not liable as a contributory.

5 Ch 270, -1, -2
273, -4;
— 350, 352 (n
357
6 Ch 49, 51,
11 Eq 104, -1
— 134-5,
8 Ch 272-
278, 280, -
15 Eq 408,
410-2
8 Ch 772
9 Ch 64

THIS was an appeal from an order of the Master of the Rolls made in the winding-up of the *Heyford Company, Limited.* The case is reported (1). The company was registered in August, 1865. *George Pell* signed the memorandum of association as a subscriber for 1350 shares of £20 each.

In clause 86 of the articles of association a certain agreement was set forth which was thereby ratified and declared to be binding on the company, by which *Pell* agreed to sell to the company the good will and stock in trade of a certain business carried on by him, and it was agreed that as part of the consideration to be paid to *Pell* by the company, the company were to issue to *Pell,* or his nominees, 1500 shares of the nominal value of £20 each, which shares should be credited in the books of the company as fully paid up, and that *Pell* would accept the same in part payment of the purchase or consideration money for his interest in the premises sold to the company.

150 paid-up shares were accordingly allotted in the names of *Pell's* nominees, and 1350 in his own name.

On the 21st of December, 1866, the company was ordered to be wound up.

The books of the company shewed no payment for the shares standing in *Pell's* name, and no other shares were allotted to him except the shares mentioned in the articles. Under these circumstances the Master of the Rolls held that *Pell* was liable as a contributory, but was entitled to be allowed the value of any property handed over by him to the company; and accordingly made an order placing *Pell* on the list of contributories, but directing an inquiry as to the value of the property handed over by him. From this decision *Pell* appealed.

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(1) Law Rep. 8 Eq. 222.

Mr. *Westlake*, for the Appellant:—

This case is not distinguishable from *Drummond's Case* (1). The articles of association adopted the agreement. The other shareholders and the public generally had notice that the 1350 shares for which the Appellant subscribed were part of the 1500 shares which he was to receive under the agreement. In *Migotti's Case* (2) a long interval elapsed between the signing of the memorandum and the allotment of the shares. The effect of the inquiry directed by the Master of the Rolls would be to call in question the agreement, which has been confirmed and acted on, and is binding upon the creditors as well as on the shareholders.

Mr. *Roxburgh*, Q.C., for the official liquidator:—

There is nothing in the memorandum to shew any connection between the 1500 shares mentioned in the agreement and the 1350 for which *Pell* subscribed. If *Pell* had claimed the 1350 for which he had subscribed, as well as the 1500 paid-up shares to which he was entitled under the agreement, how could the directors have refused to allot them? And if he could have insisted on 1350 ordinary shares being allotted to him, it follows, by the same reasoning, that he was bound to take them. In *Drummond's Case* the agreement was stated in the prospectus, so that the public could not have been misled. *Migotti's Case* and *Baron de Beville's Case* (3) are in point. With respect to the inquiry directed by the Master of the Rolls, the result will only be important in regulating the equities between the shareholders: for a contributory can have no set-off as against the creditors.

(1) Law Rep. 4 Ch. 772.

(2) Law Rep. 4 Eq. 238.

(3) Law Rep. 7 Eq. 11.

L. J. G.
1869
PELL'S CASE.

SIR G. M. GIFFARD, L.J., after shortly referring to the facts above stated, continued :—

I agree with the Master of the Rolls that the shares issued by the company to *Pell* must be taken to have been issued in respect of their obligation under the agreement. But the Master of the Rolls directed an inquiry as to the value of the property handed over by him under the agreement, and declared the Appellant entitled to be allowed only the amount of that value. Now that agreement has not been impeached by any evidence or otherwise. The Court has, therefore, no grounds for going behind that agreement. I must, consequently, take it that in this case, as in *Drummond's Case* (1), the subscriber agreed to take 1350 shares, and that he paid for them in money's worth. I think, therefore, he must be struck off the list of contributories.

Solicitors for the Appellant: Messrs. *Elmslie, Forsyth, & Sedgwick.*

Solicitors for the Official Liquidator: Messrs. *Denton & Hall.*

Ex parte CLAYTON. *In re* CLAYTON.

L. J. G.
1869
Nov. 6.

Bankruptcy Act, 1861, s. 159—*Debt without Expectation of Payment—Damages in Tort.*

After an order *nisi* had been made in a divorce suit, dissolving the marriage, and ordering the co-Respondent to pay damages and costs, the co-Respondent made away with his property, and when the order became absolute he was utterly without means to pay them, and immediately afterwards was made bankrupt on his own application. He owed only one other debt of trifling amount for money borrowed some years before :—

Held, that the damages and costs were not a debt "contracted" by him within the meaning of the *Bankruptcy Act*, 1861, s. 159, and that he could not be dealt with as having contracted any of his debts without reasonable expectation of being able to pay them.

THIS was an appeal by the bankrupt from an order of the Judge of the County Court of *Cheshire*, granting the bankrupt's order of discharge subject to a condition that he should pay £1 per month out of his income.

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(1) Law Rep. 4 Ch. 772.

L. J. G.
1869

Ex parte CLAYTON.
In re CLAYTON.

The bankrupt had been co-Respondent in a divorce suit, and on the 21st of February, 1868, a decree *nisi* was made dissolving the marriage, and ordering him to pay to the Petitioner £50 damages and the costs. On the 4th of May, 1869, the decree having become absolute, an order was made on him for payment of the damages and taxed costs, amounting altogether to £154. He was then utterly without means of payment, and on the 10th of May he petitioned for, and obtained, an adjudication in bankruptcy against himself.

The bankrupt had a fourth share of houses which had been given to him and his sisters by their father, and which brought in about £100 a year. The value of this interest was estimated at £240, and it appeared that on the 4th of March, 1868, the bankrupt had mortgaged it for that sum. His only other property was furniture valued at £16 13*s.* He had only two creditors, the Petitioner in the divorce suit, and another to whom he owed £30 for money borrowed in 1864. His father had been in the habit of employing him as a labourer at 12*s.* a week. In his accounts he stated his expenditure for the support of himself and family during the past year to have been £200.

The County Court Judge referred to *Re Boswall* (1), and, agreeing with the opinion of Lord Justice *Turner*, held that the granting the order of discharge was not imperative, and that he therefore could annex conditions to it. His Honour accordingly made the order above stated.

Mr. *W. P. Macdonald*, for the bankrupt:—

The 159th section of the Act of 1861 is imperative, and none of the offences specified in that section having been alleged, the bankrupt ought to have received an absolute order of discharge: *Re Mew and Thorne* (2).

Mr. *De Gex*, Q.C., *contrà*:—

The bankrupt having 12*s.* a week, and a property bringing in about 10*s.* a week more, spent £200 in a year, and then contracted this large debt. He therefore has committed the offence of contracting a debt without reasonable expectation of being able to pay it, which is one of the specified offences.

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(1) 10 W. R. 533.

(2) 10 W. R. 790.

[The LORD JUSTICE GIFFARD:—Does "contracting a debt" apply to a debt not arising *ex contractu?*]

Yes; contracting a debt only means becoming indebted, it does not import a contract any more than the expressions "contracting a habit" or "contracting a disease" do.

SIR G. M. GIFFARD, L.J.:—

If Lord *Westbury's* decision in *Re Mew and Thorne* (1) had been brought to the attention of the learned Judge of the County Court he would not have made the order now under appeal, for he evidently made it under the impression that *Re Boswall* (2) was the only case on the subject. Even if my opinion did not agree with that of Lord *Westbury*, I should feel bound to follow his decision, but I quite concur in his view that the 159th section is imperative. We then have only to consider whether the bankrupt has brought himself within any of the conditions of that section. It is an undesirable result of the law for a man who has been co-Respondent in a divorce suit, and had a decision given against him, to escape by bankruptcy from payment of the damages, but I have only to administer the law as I find it. I should in any case be slow to annex conditions to a certificate on a ground not taken in the Court below, but here I think that the ground suggested fails. The damages, in my opinion, are not a debt contracted within the meaning of the section, which seems to me to refer to debts arising *ex contractu*, and the only other debt is one of £30, so that I think it impossible to say that the bankrupt contracted debts without reasonable expectation of being able to pay them. The order of discharge must be made unconditional.

Solicitors: Messrs. *Meredith & Co.*

(1) 10 W. R. 790. (2) 10 W. R. 533.

L. J. G.
1869
Nov. 6.

Ex parte PRANCE. *In re* KEMP.

Bankruptcy—Ex parte Order.

A Commissioner in Bankruptcy examined, as to his receipts on account of the bankrupt's estate, a solicitor who had been solicitor to a former assignee, and who was now attending on behalf of another party, and had not been summoned to be examined. The solicitor admitted the receipt of certain moneys, but claimed deductions. The Commissioner required him to pay the amount of receipts to the assignee without deductions, and about three weeks afterwards, without any notice to him, made an order to that effect:—

Held, that, whatever the merits of the case might be, the order must be discharged, as having been made without giving the solicitor a proper opportunity of defending himself.

THIS was an appeal by Mr. *Prance* from an order of Mr. Commissioner *Andrews*, of the *Exeter* District.

Schondorf, the creditors' assignee of *Kemp*, employed Mr. *Prance* as his solicitor. On the 24th of May, 1869, *Schondorf* was removed from being assignee, and the official assignee was directed to wind up the estate. Mr. *Prance* did not act as his solicitor. On the 13th of May Mr. *Prance* had received £140, the proceeds of sale of a small leasehold property, and subsequently £128 2*s.* 6*d.* from debtors who owed small sums to the estate.

On the 17th of June Mr. *Prance* attended at the Bankruptcy Court at *Exeter* to support a claim by *Forbes & Co.* against *Kemp's* estate. He was called into the Registrar's room, and sworn, and examined as to his receipts on account of the estate. He admitted that he had received the £140, and some sums from debtors to the estate, of which he promised to send in an account. On the 5th of July he attended again on behalf of *Forbes & Co.*, and was sworn and examined by the Commissioner. He admitted the receipt of the £128 2*s.* 6*d.*, but stated that he was advised to deduct his payments before paying over the money to the assignee. These examinations took place without Mr. *Prance* ever having been summoned, and while, as appears above, he was attending in a matter not connected with the question of his receipts. The Commissioner thereupon stated to Mr. *Prance* that he must pay over the amount of his receipts without deduction. This not having been done, the Commissioner, on the 28th of July, made an order *ex parte* on Mr. *Prance* to pay to the official assignee the £268 2*s*. 6*d*. within seven days. Mr. *Prance* appealed.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The 17th Rule of the General Orders of October, 1852, requires all applications to be made on motions supported by affidavit. This was made without any application, and in defiance of the elementary rule that in a Court of justice every one must have an opportunity of defending himself before an order is made against him.

Mr. *Little*, Q.C., and Mr. *Doria*, for the official assignee:—

The order does substantial justice, and Mr. *Prance* had an opportunity of defending himself.

[The LORD JUSTICE GIFFARD:—He ought to have had an opportunity of defending himself by counsel if he thought fit.]

SIR G. M. GIFFARD, L.J.:—

The order under appeal cannot stand. Mr. *Prance* has a right to say that an order of this kind cannot be made *ex parte*. I assume the merits to be as clear against him as the official assignee contends; but still a solicitor, like all the rest of Her Majesty's subjects, has a right to insist that an order such as this shall not be made against him behind his back. The present order must be discharged without prejudice to any application to the learned Commissioner.

Solicitors: *J. R. Chidley*; Messrs. *Linklaters, Hackwood, & Addison.*

L. J. G.
1869
Nov. 2.

1919 6

In re BARNED'S BANKING COMPANY.

FORWOODS' CLAIM.

Company—Proof by Secured Creditor—Sending in Claim—Gen. Ord. 11 *Nov.* 1862, *Rule* 20.

A banking company, in consideration of *F.* accepting bills of exchange against a ship and her freight, agreed by letter of guarantee to provide him with funds to meet the acceptances, which were secured by a mortgage by *B.* Before the bills became due the company was ordered to be wound up. When they became due, a notary took the guarantee to the bank, and requested payment, which the official liquidator refused. No further claim was made until after the security had been realized by *F.* :—

Held (affirming the decision of the Master of the Rolls), that the presentment of the guarantee by the notary was not putting in a claim within the meaning of the rule in *Kellock's Case* (1), and that *F.* could prove only for the balance which remained due after he had received the proceeds of the securities.

Kellock's Case explained.

THIS was a motion by way of appeal from an order of the Master of the Rolls, dismissing a summons by Messrs. *Forwood*, to have a proof admitted for the full amount of certain bills of exchange.

In March, 1866, *James Baines & Co.* applied to Messrs. *Forwood* to accept bills of exchange for them, which Messrs. *Forwood* agreed to do upon having securities assigned to them, and on *Barned's Banking Company* agreeing to find funds to meet the acceptances.

On the 27th of March, 1866, the managing director of *Barned's Banking Company* gave to Messrs. *Forwood* the following letter of guarantee on behalf of the company :—

"In consideration of your accepting the drafts of Messrs. *T. M. Mackay & Co.* at three months' date for £9000, against the ship *Naval Reserve* and her freight, and on your agreeing to renew such drafts for a further period of three months, we agree to provide you with funds to meet such drafts at least seven days before maturity, it being understood that if we are called upon by Messrs. *J. Baines & Co.* to pay you the amount of the drafts, you transfer to us your said security."

Messrs. *Forwood* accordingly accepted the drafts for £9000, and mortgages of the ship and freight were executed to them by *J. Baines & Co.*. On the 4th of April, 1866, a precisely similar transaction took place as to bills for £6000, drawn against the ship *Golden South* and shares of the ship *Golden Empire*, and their respective freights.

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(1) Law Rep. 3 Ch. 769.

On the 18th of April, 1866, the banking company stopped payment, and soon afterwards an order was made for winding it up. On the 31st of May, 1866, an advertisement was issued in the form prescribed by Rule 20 of the General Order of the 11th of November, 1862, for creditors to send in the particulars of their debts or claims before the 22nd of July.

On the 25th of June, the clerk of a notary public acting for Messrs. *Forwood* took the guarantee of the 27th of March to the bank, and requested payment of the amount, as the bills for £9000 would fall due in two days. The clerk of the bank took the guarantee and shewed it to the official liquidator, and then returned it to the clerk who brought it, saying that it could not be paid. The notary thereupon affixed the notarial memorandum that it could not be paid. The other letter of guarantee was dealt with in the same way. On the 1st of August, *J. Baines & Co.* having stopped payment in April, 1866, Messrs. *Forwood* were obliged to take up and pay the bills.

Nothing further was done by Messrs. *Forwood* in the way of making a claim against the company till March, 1868, when after having paid the bills of exchange and received the proceeds of the ships and freight, which in both cases were insufficient to meet the bills, they wrote to the official liquidator a letter claiming for £2998, the balance that remained due under the second guarantee. Subsequently, on the 12th June, 1868, immediately after the decision of *Kellock's Case* (1) by the Court of Appeal, they sent in a formal claim to prove for the whole £15,000. The Master of the Rolls, on summons adjourned into Court, decided that the presentation of the guarantees by the notary was not the sending in a claim within the meaning of *Kellock's Case*, and that as the security had been realized before any further claim was sent in, Messrs. *Forwood* could only prove for the balance.

(1) Law Rep. 3 Ch. 769.

L. J. G.

1869

In re BARNED'S BANKING CO.

FORWOODS' CLAIM.

Mr. *Jessel*, Q.C., and Mr. *Hemming* for the appeal motion:—

According to the General Order of the 11th of November, 1862, Rules 21, 22, when notice of a debt is sent in, it is the duty of the official liquidator to investigate it, and see whether it ought not to be admitted without proof. Nothing more, then, can be requisite than notice to the official liquidator that a debt of a certain amount is claimed. A formal claim is not necessary, all that is required being, to send in the "particulars of the debt or claim," and there is nothing in *Kellock's Case* (1), to shew that any particular form is required. A letter was there held effectual. No notice of claim could practically be better than this application by a notary, which was brought to the personal notice of the liquidator.

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidator, were not called upon.

SIR G. M. GIFFARD, L.J.:—

What was decided by *Kellock's Case* is quite clear. The first point decided was this, that the rule in bankruptcy as to proof by secured creditors does not apply in windings-up, but that the well-known rule laid down in *Mason* v. *Bogg* (2), and afterwards by the House of Lords in *Attorney-General* v. *Cox* (3), that a creditor holding security may, if he chooses, prove for the whole of his debt and retain his security, does apply. That was the first point. Then there came a second question, viz., what was the date after which the creditor might realize his security, and not be bound to give credit for the proceeds of the realization. The Lord Chancellor, in giving his judgment, says this (4): "I think, however, that the true rule is, that the debt is to be taken as it stands at the time when the claim is put in." Then what is meant by putting in the claim. To my mind, it is perfectly clear that the Lord Chancellor intended the putting in a claim under the General Order.

Then the only question that remains is, whether what took place here amounted to a claim under the General Order or not. A letter in proper form would undoubtedly be such a claim, and

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(1) Law Rep. 3 Ch. 769.

(2) 2 My. & Cr. 443.

(3) 3 H. L. C. 240.

(4) Law Rep. 3 Ch. 779.

L. J. G.

1869

In re BARNED'S BANKING CO.

FORWOODS' CLAIM.

there cannot be a more convenient form of claim than a letter, and that disposes of the observations that have been made on *Kellock's Case* (1). But what was done in this case was not done with the intention of making a claim under the Order, or with any reference to the Order, or with any notion that the official liquidator would be required to record the demand that was made, but a notary was sent, who presented a guarantee, and asked for the payment of that guarantee, which was refused, and he took the guarantee away. That in my opinion is clearly not a claim within the meaning of the 20th rule of the Order:—[His Lordship here read the rule.] I certainly, if a claim had been made, which was intended to be a claim under the Order, should not have been disposed to defeat it upon a mere question of form; but I look upon the difference between the demand in the present case and a claim under the Order as a matter of substance and not of form. If a mere demand—the document on which the demand is rested being immediately taken away, no record being required of it, and nothing in writing being left—were to be decided to amount to a claim, a way would be opened for endless contests on affidavits as to whether claims had been made. The claim required in such a case as the present must be a claim under the Order, and in point of fact that claim when made is, for such purposes, equivalent to the proof against a testator's estate where an affidavit is made. The only difference is, that in winding-up cases the affidavit is not required, unless the official liquidator asks for it, and therefore the time of sending in the claim is selected as the time after which the security may be realized, because the claim, if properly made, is in reality equivalent to proof in bankruptcy, or to proof against a testator's estate.

For these reasons I am of opinion that this appeal must be dismissed with costs.

Solicitors: Messrs. *Haigh, Herbert, & Co.*; Messrs. *Freshfield.*

(1) Law Rep. 3 Ch. 769.

L. J. G.
1869
Nov. 3.

In re NATAL INVESTMENT COMPANY.

SNELL'S CASE.

Company—Contributory—Surrender of Shares before Entry on Register—Subscriber of Memorandum—Companies Act, 1862, *s.* 23.

5 Ch 351,
— 707-9,
710-1-2,
13 Eq 480
9 Ch 57-9,
4 Ch D 333
5 Ch D. 527
531,
12 Ch D 199
200
WN 81/78
17 Ch D. 92-6

Where the directors of a company have power to accept the surrender of shares, they may accept the surrender of the shares of a subscriber of the memorandum of association whose name has not been entered on the share register pursuant to the 23rd section of the *Companies Act*, 1862.

S., a subscriber of the memorandum of association of a company, who was also a director, applied for the number of shares for which he had subscribed, and paid the deposit on them. Before any shares had been allotted to him, or his name had been entered on the share register, he withdrew from the office of director, and applied to have his application for shares cancelled. The directors, who had power under the articles to accept the surrender of shares, cancelled the application and returned the deposit. The company was afterwards wound up:—

Held (reversing the decision of the Master of the Rolls), that the surrender of the shares was valid, and that *S.* was not a contributory.

THIS was an appeal from an order made by the Master of the Rolls in the winding up of the *Natal Investment Company, Limited.*

The company was registered under the *Companies Act*, 1862, in the year 1864, and in the month of May in that year Mr. *Edward Snell* applied for twenty shares, subscribed the memorandum of association for that number of shares, and paid the deposit of £1 on each share to the bankers of the company. He also agreed to become a director, and attended some of the meetings of the board. No shares, however, were actually allotted to him, and his name was not entered on the register.

On the 30th of August, 1864, Mr. *Snell* attended a meeting of the directors, at which he discovered that the position of the company was different from what he had expected, and he then expressed his intention of withdrawing from all connection with the company. On the 31st of August he sent to the secretary a letter in the following terms:—

"Sir,—The arrangement the directors now have in contemplation for establishing the *Natal Investment Company* is so very different from what I was given to understand at the time I was induced to join the direction, and not being individually persuaded as to the advantages likely to accrue to the company in the event of such arrangement being confirmed, I beg respectfully to tender my resignation of my seat at the board. I have also to request you to cancel my application for shares, and to return me the amount of deposit paid thereon, such application having been made under misapprehension."

On the 13th of September, a meeting of the board was held, at which it was resolved to accede to Mr. *Snell's* application; and on the 15th of September the secretary returned him the deposit of £20, and from that time he was not treated as a shareholder.

The 38th clause of the articles of association was as follows:—"The directors may, if they think fit, accept the surrender or forfeiture of his shares by any shareholder desirous of surrendering or forfeiting them, on such terms as the directors may think fit."

The company was subsequently wound up; and the Master of the Rolls held, that under the circumstances above stated, Mr. *Snell* ought to be put on the list of contributories for twenty shares. From this decision Mr. *Snell* appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Marten*, for the Appellant:—

The only difficulty in this case arises from the fact that Mr. *Snell's* name was not entered on the register. But it was the duty of the directors to enter his name as the owner of twenty specified shares, and it must be taken as having been done. That being so the directors had full power to accept the surrender of the shares. Both parties were desirous of severing the Appellant's connection with the company, and everything was done which could be done to effect that purpose.

Mr. *Fitzroy Kelly* (Mr. *Jessel*, Q.C., with him), for the liquidator:—

The 23rd section of the *Companies Act*, 1862, is explicit; and no one can be considered a shareholder whose name is not on the register. Mr. *Snell* had, therefore, no shares which could be surrendered. The attempted cancellation of his shares by the directors was, therefore, invalid; and Mr. *Snell's* obligation to take twenty

L. J. G.
1869
SNELL'S CASE.

shares as a subscriber of the memorandum still remains. He was himself a director, and ought to have seen that his name was entered. He cannot now complain of the consequences of his neglect. The case is governed by *Evans's Case* (1).

SIR G. M. GIFFARD, L.J.:—

I cannot agree with the opinion of the Master of the Rolls in this case, because it seems to me that, there being a special power in the articles of association enabling the directors to accept the surrender of shares, everything was done which was requisite to sever the connection of Mr. *Snell* with the company. As he had signed the memorandum for twenty shares, he became a member of the company for that number of shares, and in strictness his name ought to have been entered on the register. But this was not done, and so the matter rested for some time. Mr. *Snell* had power to resign his office of director, and he did so, and wrote a letter saying, that as the company was a different one from what he supposed he wished to sever his connection with the company. What was done was perfectly *bonâ fide.* It is true that no specific shares were allotted to him; but for all the purposes of the Act he was a shareholder.

If, therefore, Mr. *Snell's* name had been on the register, it is clear that under the 38th clause of the articles he might have done this very thing which he did, and have surrendered his shares, his liability, of course, remaining for a year as a past member of the company. The only question is, whether he was prevented by the 23rd section of the Act from doing this before his name was entered on the register. This section provides that the subscribers of the memorandum of association "shall be entered as members on the register of members." Can it be said that where the substance of the transaction is, that both parties being able to sever and wishing to sever their connection with each other, they cannot do it because the name of the shareholder has not been entered on the register? In my opinion, where there is a power in the articles of association to cancel shares, and that cancellation has taken place before the name has been entered on the register, the provisions of the section do not apply.

(1) Law Rep. 2 Ch. 427.

For these reasons I think there was no matter of form preventing the parties from carrying out their intention in this case. The decision of the Master of the Rolls must, therefore, be reversed, and Mr. *Snell's* name removed from the list.

Solicitors for the Appellant: Messrs. *Thomas & Hollams*.

Solicitors for the Liquidator: Messrs. *Stevens, Wilkinson, & Harries.*

L. C.
1869
Nov. 15, 25.

4 Ch. D. 184

BUTLER *v.* GRAY.

Power—Appointment—General Bequest—Default of Appointment.

A testator gave his residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children :—

Held, that the testator's children took their respective shares for their lives, and had power to appoint to their respective children, if any.

One of the daughters, by her will, after expressing her intention to appoint her share to her children, gave a part only to her children, and, after directing her debts and legacies to be paid, gave to one of her children the residue of the personal estate which belonged to her, or which she had any general power to dispose of :—

Held, that the unappointed part of the share was not appointed by the residuary bequest, and was divisible amongst the children equally.

THOMAS LEWIS, by his will, dated the 4th of May, 1816, gave the residue of his estate "to be equally divided, share and share alike, among all my children, who are now or were then living. My will is, that a trust fund be formed as soon as possible, and invest the money as it comes in . . . . the dividends for each of my children's own use during their respective lives, and if they have a child or children born in wedlock, then the principal to be at the disposal of the parent, by will, to such child or children; but should either or any of my children die unmarried, or, if married, leave no child or children, or any that does not attain the age of twenty-one years, or daughters' marriage, then my will is, that the share of the residuum fund belonging to such of my children who die may revert back into the residuum for the benefit of the survivors; and my will is, that my daughters' share of the residuum thus directed to be from time to time invested in the Three per Cents. in each of their names, together with those of my son *George* and Mr. *W. Kirkpatrick*, be for their sole use and benefit, not subject to the debts or control of any husband they have or may intermarry with, the dividends for their own use, and their own receipts for the same to be a sufficient discharge, with full power to dispose of the principal among any child or children in such shares and proportions as they, by will, direct; but if any die unmarried, or, if married, leave no child or children that attain the age of twenty-one years or day of marriage, then my will is, that the share of such of my children who die fall into my residuum for the benefit of the survivors."

L. C.
1869
BUTLER
v.
GRAY.

Thomas Lewis died in 1817, leaving eight children, several of whom afterwards died, by which the shares of the others were increased, and that given for the benefit of one of the daughters, *Sarah Gray*, and her family, amounted, at the time of her death, to £7064 consols, and was afterwards increased to £8206 consols by the death of another daughter without issue.

Sarah Gray, by her will, dated the 23rd of August, 1845, after reciting that by virtue of the will of her father the sum of £7604 consols was settled upon her for her life, with full power for her to dispose of the principal among any child or children in such shares and proportions as she, by her will, might direct, proceeded to say, that in exercise of the said power created by the said will, and of every other power enabling her in that behalf, she did by that her will appoint and dispose of the said sum of £7064 consols, and all other the stocks, funds, and securities which might thereafter form part of, or be in anywise comprised in, the share or shares which, by virtue of the said will cf her father, she had power to appoint or dispose of by that her will, among all her said children, in the shares and proportions following: £20 to her daughter *Sarah*; £20 to her daughter *Rachel*; £20 to her daughter *Rebecca*; £20 to her daughter *Benigna*; £6000 consols to her son *John Edward Gray*, he covenanting to pay the interest to *Rebecca* and *Benigna* during their lives as long as they should remain single. The testatrix then gave several specific legacies, and several legacies of £5 each to her other relations, and the will then contained the following words: "I direct that all my just debts, funeral and testamentary expenses, and the several pecuniary legacies hereinbefore given, or which I may give by any codicil hereto, shall, in the first instance, be fully paid; and after payment thereof, I give all the residue of my personal estate and effects, whatsoever and wheresoever, not hereinbefore specifically bequeathed, which shall belong to me at the time of my decease, or which by virtue of any general power I am able to dispose of by this my will, unto my son *John Edward Gray*, his executors, administrators, and assigns."

L. C.
1869
BUTLER
v.
GRAY.

Sarah Gray died in 1854, leaving five children, and as she had specifically appointed only four sums of £20 and the sum of £6000 consols, questions were raised as to the disposition of the remainder of her share, and a special case was stated for the opinion of the Court, the questions being, in effect, whether any part of the share was not effectually appointed, and who was entitled to the remainder of the share after the specific appointments.

The Vice-Chancellor *Malins* decided that *John Edward Gray* took this remainder (1). His sisters, who were the Plaintiffs in the case, appealed.

(1) 1869. June 1. SIR R. MALINS, V.C., after reading and commenting on the important parts of the two wills, said that, on the part of the Plaintiffs, two objections were made to the will operating on the remainder of the fund, *ultrà* the £6000 consols and the £80. First, it was said that the residuary bequest could not have been intended to operate, because there was a charge of debts; but that was unimportant, and only meant that the debts were to be paid out of the fund which was applicable to pay debts—that was to say, the property of the testatrix. The case of *Clogstoun* v. *Walcott* (13 Sim. 523), on which reliance was placed, did not apply.

But every portion of the will must be reconciled, if possible; and the beginning of the will shewed as clear an intention of disposing of everything over which she had this power as could well be shewn. She had four daughters and one son, and as she made specific appointments to the daughters, it must be taken that she intended the rest to go to the son. Then, in the latter portion of the will, she purported to give all her property, and also all over which she had a general power of disposition; and, if necessary, His Honour would rather come to the conclusion that the word " general " found its way into the will by mistake.

Looking at the whole will, and the expressed intention to give to the children, it seemed to His Honour that that could only be done by giving to the son what the daughters did not take, and that the latter part of the will shewed the clearest intention so to do.

Another argument had, however, been relied upon. By the first part of the testator's will an absolute interest was given to each child; by the second part the daughters were to have separate estates, with a power of disposition amongst their children. Now, did that mean that they were to be tenants for life, with remainder to their children in default of appointment? His Honour did not think that the right view, and thought the better view was, that the first part of the testator's will gave the property absolutely, and that by the subsequent part of the will it was only cut down so far as to give an estate for life, with a power of disposition amongst the children.

Either the will of the testatrix executed the power, or if it did not, then the testatrix took absolutely; consequently, if this remainder did not pass under the appointment, it passed with the residue of her estate.

In either case the son would take; and in so deciding, His Honour was satisfied that he was effecting the wishes of the testatrix.

Mr. *Cotton*, Q.C., and Mr. *S. P. Butler*, for the Appellants:—

It is clear that in the gift of the residue the testatrix was only dealing with what was her own property, and not with what she knew she had only a limited power of appointment over: *Clogstoun* v. *Walcott* (1). We say that under her father's will she took a life interest to herself, with a power of distribution amongst her children, and that in default of any exercise of that power the children would take equally, and we say that she did not exercise the power as to the whole fund.

Mr. *C. Hall*, for *J. E. Gray*:—

No doubt there have been cases in which it has been held that a power to appoint amongst children is in the nature of a trust which the parent is bound to exercise: *Maddison* v. *Andrew* (2); *Brown* v. *Higgs* (3). But this is not a case of that description. The debts are merely charged on the property which absolutely belonged to the testatrix, and no argument can be drawn from the fact of debts being charged. A charge of debts was formerly held to shew that the legal estate in a mortgaged property did not pass by a residuary devise, but that is now not the law: *In re Stevens' Will* (4). As to *Clogstoun* v. *Walcott*, it is balanced by *Elliott* v. *Elliott* (5). We say, first, that this fund was the property of the testatrix, and if it was not, but was only subject to the power, then the power has been exercised.

Mr. *Freeling*, for the trustees.

Mr. *Cotton*, in reply.

LORD HATHERLEY, L.C.:—

This is an appeal from a decision of the Vice-Chancellor *Malins*, upon a special case submitted to him as to the effect of the will of Mrs. *Sarah Gray*, upon property in which a special interest had been created in her favour. I say a "special interest," because one of the points is what the extent of that interest really was.

Two questions have been raised by this case, first, what was the

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(1) 13 Sim. 523.

(2) 1 Ves. Sen. 57.

(3) 8 Ves. 574.

(4) Law Rep. 6 Eq. 597.

(5) 15 Sim. 321.

L. C.
1869
BUTLER
v.
GRAY.

interest of Mrs. *Gray* under the will of her father? Was it an absolute interest defeasible only in the event of her dying without leaving any children at all, or without leaving children to attain twenty-one, or daughters who should marry, or was it a simple life interest, with power to distribute among her children, if children she had? And, secondly, if she had only a power has she exercised it?

As to the first question, if she took only a power, then the case would be brought within the doctrine of *Brown* v. *Higgs* (1), and *Maddison* v. *Andrew* (2), and that class of cases, in which it was held that there was a duty imposed upon the tenant for life to exercise the power on behalf of the objects of the power, and in the event of the power not being fully exercised, then the objects of the power would take as if there had been a gift to them in default of appointment.

Now, the will of the father, although not very artistically worded, is, in my opinion, sufficiently plain to shew that Mrs. *Gray's* interest was intended only to be a life interest, with a power to appoint among her children, and in default of her having children (not in default of appointment) a gift over to the other members of her family. In that view of the case, therefore, if the power was not exercised, the children would be held to be direct objects of the original testator's bounty, and in default of appointment to take whatever had not been well appointed.

But the Vice-Chancellor has arrived at what seems to me an untenable conclusion—that Mrs. *Gray* took an absolute interest in the property with a power by will of making a disposition amongst the children, but if the power was not exercised, then that the property fell back to her absolutely. No doubt there may be some colour for that construction upon some authorities, such as *Mayer* v. *Townsend* (3), which have gone to this extent, that where a child is intended as the object of bounty, and a share is described as that child's share, and then a settlement is made of the share for the benefit of that child and her family (especially in the case of daughters), there it has been held that the settlement is made in the event of there being grandchildren, and if there be no gift over and no grandchildren, then the child is considered to be entitled to the whole. There is a case of *Brook* v. *Brook* (1), which goes a little further than that; it was not cited, and I refer to it only to shew that I have not overlooked it. But that case differs from this in two important particulars, for there was no life interest, and no gift over in default of appointment.

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(1) 8 Ves. 574.

(2) 1 Ves. Sen. 57.

(3) 3 Beav. 443.

It seems to me impossible to hold upon this will that the original testator intended more than a tenancy for life with this power to appoint amongst children, which she was bound, according to the doctrine of *Maddison* v. *Andrew* (2), and *Brown* v. *Higgs* (3), to execute, and that if she did not execute it, the interest would be vested in the children and not in the parent.

Then, coming to the will of the daughter, the power is recited as a simple power to appoint amongst her children. [His Lordship then read and commented on the terms of the will, and said that there had probably been some mistake which could not now be rectified, as the Court could only look at the will as it stood.] The Vice-Chancellor, however, thought that he could spell out from this will a gift of the remainder of the fund to the son, but I cannot assent to the reasoning on which the learned Vice-Chancellor arrived at that conclusion. I should not be disposed to differ from him in holding that the testatrix meant her debts and legacies to be paid out of her own property, but I cannot follow him in holding that he could only make the whole of the will consistent by saying that that which was not given to the daughters must be given to the son. I cannot conceive why it might not as well be said that the only intelligible meaning was, that what she has not given to the son must be given to the daughters, and I can see no reason for selecting one in preference to the other. It might, indeed, be a more rational interpretation to say that the property should be given rateably, but I do not think the authorities will allow me to do so. In the case of *Maddison* v. *Andrew* the Court declined to take upon itself the duty of disposing of what the testator had not intended to dispose of, and though that was not an irrational suggestion at the time when it was made, the law on this subject is now settled by authority.

(1) 3 Sm. & G. 280.

(2) 1 Ves. Sen. 57.

(3) 8 Ves. 574.

L. C.
1869
BUTLER
v.
GRAY.

Although the testatrix has expressed the strongest intention to distribute all, yet she has not distributed all, and though she may be taken to have been very desirous that the power should be exercised, and very desirous of conforming to the rule laid down in *Brown* v. *Higgs* (1), yet if she has not done so, then all the Court can say is, that this portion ought to have been disposed of by her amongst the children, and not having been so disposed of, it will be distributed equally amongst them all.

Therefore, I think the decree of the Vice-Chancellor upon the special case must be discharged, and that the answers to the questions must be, that the whole of the trust fund beyond the £80 and the £6000 consols was left unappointed by the will of *Sarah Gray*, and is divisible among all the surviving children.

Solicitors for all Parties: Messrs. *Beachcroft & Thompson.*

BRUCE *v.* GARDEN.

L. C.
1869
Dec. 14.

Agent—Debtor and Creditor—Policy of Assurance.

An army agent, to whom an officer was largely indebted on the balance of their account, effected in his own name policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shewn to him, or that he knew that he was in the account charged with the premiums:—

Held (reversing the decree of *James*, V.C.), that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives.

THE Plaintiff in this case was the administrator of Major *Bruce*, and claimed the balance of a sum of money received by the Defendant under policies of assurance on the life of Major *Bruce*.

The Defendant was an army agent, and had from time to time made advances of money to Major *Bruce*, and supplied him with goods, receiving his half-pay and other moneys of his. The real balance of the account was always against Major *Bruce*, but the Defendant from time to time drew bills on Major *Bruce* for round sums, and credited him with the amounts, which at times made an apparent balance in his favour. The bills were, however, always returned dishonoured, and the amounts then appeared on the other side of the account. The Defendant effected in his own name, at different times, six policies on the life of Major *Bruce*, and paid the premiums on them, charging him with the amounts in the books kept by the Defendant, and including them in the sums which contributed to form the balances, and charging interest on them. Major *Bruce* had attended at the insurance office when the policies were effected, but there was no evidence that he was aware that the amounts of the premiums were charged against him, or that any copy of the account had been sent to him. No letters from the Defendant to Major *Bruce* were produced, but a large number from him to the Defendant were in the possession of the Defendant, all asking earnestly for advances of money, and in one letter, of the 19th of March, 1861, Major *Bruce* requested that his account might be charged with interest at the rate of 10 per cent. in order to compensate the Defendant.

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(1) 8 Ves. 574.

Major *Bruce* died in June, 1861, and the Defendant afterwards received the money due on the policies, amounting to £3150. According to the books of the Defendant the balance due from Major *Bruce* at the time of his death was £1874 10*s*. 8*d*., and in the books an entry was made on the credit side of the account, "1861, Dec. 31. By *R. S. Garden*. £1874 10*s*. 8*d*.," which the Plaintiff alleged to refer to part of money received under the policies; but the Defendant, by his answer, said that he wrote off that sum as a bad debt, and denied that it formed any part of the money received under the policies.

Under these circumstances the Plaintiff claimed the balance of the money received under the policies.

The cause came on for hearing before the Vice-Chancellor *James*, who made a decree against the Defendant for an account, as reported (1), where the facts are more fully stated.

The Defendant appealed.

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(1) Law Rep. 8 Eq. 430.

L. C.
1869
Bruce
v
Garden.

Mr. *Willcock*, Q.C., and Mr. *L. Field*, for the Appellant:—

There is no allegation or evidence of any communication having been made to Major *Bruce* as to these premiums. Major *Bruce* was, no doubt, aware that his life was insured by the Defendant, but must have thought that the Defendant effected the policies for his own security, as he had no other chance of being repaid. *Primâ facie*, a policy belongs to the person in whose name it is effected, and the onus is on those who claim it against him to make out their case, and here they have made out none. The account was never seen or known of by Major *Bruce*, and he was in no way bound to allow the premiums if he had lived, and had not chosen to do so. The account was only kept by the Defendant for his private information, in order to shew him how he stood with respect to his advances to Major *Bruce*. As to the bills, they were all for round sums, and were merely drawn in order to raise money on them, and had nothing to do with the balances. The cases of *Freme* v. *Brade* (1), *Triston* v. *Hardey* (2), and *Morland* v. *Isaac* (3), were not so clear as this.

Mr. *Amphlett*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

The Defendant's books shew that the policies were kept on foot by the money of Major *Bruce*, and that is enough. The account was not merely a private account, for the Defendant was bound, as agent, to keep a proper account, and did so. Can anyone believe that he did not intend to charge Major *Bruce* with these premiums? In *Triston* v. *Hardey* there was no evidence of any contract, and *Freme* v. *Brade* was a case of debtor and creditor, not principal and agent. If he did not effect these policies on account of this debt he had not an insurable interest in the life of Major *Bruce*. [They cited *Courtenay* v. *Wright* (4), and *Phillips* v. *Eastwood* (5).]

Lord Hatherley, L.C.:—

This case seems to come within principles recognised by the Court, and the authorities on the subject are so clear, that we have only to consider what is the effect of the evidence.

(1) 2 De G. & J. 582. 4 Jur N.S. 776
(2) 14 Beav. 232.
(3) 20 Beav. 389. Jur N.S. [illegible]
(4) 2 Giff. 337.
(5) Ll. & G. 270.

L. C.
1869
BRUCE
v.
GARDEN.

The Court requires distinct evidence of a contract—that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor. I must, therefore, examine whether such a contract has been established in this case.

Now, there is really no proof whatever of a contract, and I think the evidence would satisfy any jury that Major *Bruce* never knew anything about these premiums being charged against him, though, no doubt, he was aware that policies had been effected.

Mr. *Garden* might, perhaps, have produced his books, and have endeavoured to charge these premiums against Major *Bruce* if events had turned out differently; but that would not bind Major *Bruce*, and I cannot find any evidence that he was ever informed that these premiums had been paid, and that he was charged with them; in fact, the evidence, as far as it goes, is rather the other way. He was certainly aware that the policies had been effected, but they were not in his name, but in Mr. *Garden's*. There was a great deal of correspondence, and a large number of letters from Major *Bruce* were scheduled, but the Plaintiff has referred to none of them, and the fact that so many letters were written without reference to these premiums is, in itself, of much importance. Also, I think the letter of the 19th of March very important, and I find nothing to lead me to believe that Major *Bruce* would have agreed to be charged 10 per cent. on these premiums if the account had turned out the other way. There is no trace of any letters from Mr. *Garden* to Major *Bruce*, and I conclude that none can be found.

The Vice-Chancellor appears to have founded his judgment, in a great measure, upon the fact that some of the bills accepted by Major *Bruce* exceeded the amount due by him, but these bills were all for round sums, and seem to have had no reference to any balance. They were never paid, and, in fact, were merely means of raising money, and cannot be treated as leading Major *Bruce* to believe that he was liable for these larger sums.

Mr. *Garden* has kept his account in a particular way, and, probably, might have endeavoured to charge these premiums in a different state of things; but there was not much chance of his recovering them against Major *Bruce's* estate, and there was no contract between them.

L. C.
1869
BRUCE
v.
GARDEN.

On the authorities, *Freme* v. *Brade* (1), and *Brown* v. *Freeman* (2), I do not see how I can decide otherwise than that the Plaintiff has not made out any case.

I must discharge the order of the Vice-Chancellor, and dismiss this bill without costs.

Solicitor for the Plaintiff: Mr. *G. E. Philbrick.*
Solicitors for the Defendant: Messrs. *Weir & Robins.*

L. C.
1869
Nov. 2, 3, 12.

7 Ch 576
10 Ch 674
App Cas 317

PARKES *v.* STEVENS.

Patent—Improvement—Combination—Novelty—Second Patent—Specification.

Under a patent for an arrangement and combination of parts, protection will not be given against the use of any particular part which is not novel.

The adaptation of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps and to other glazed surfaces, cannot of itself be the subject of a patent.

Requisites of a specification for a combination including improvements on a former patent, considered.

Observations on *Lister* v. *Leather* (3), and *Foxwell* v. *Bostock* (4).

Decision of *James*, V.C., affirmed.

THE Plaintiff in this case obtained, in 1862, letters patent for the arrangement and construction of spherical gas-lamps. No door was mentioned in that specification, but it appeared that a door turning on hinges was usually put to the lamps made by him under his patent. In 1865 he obtained a second patent for "improvements in the manufacture of railway-station and other lamps." The specification stated that his invention related to the construction of lamps of a class forming the subject of his former patent. Several improvements were described, and amongst them the method of fitting one of the panes of glass as a sliding door. The claim was for the combination only.

The Defendant had made lamps which the Plaintiff alleged were an infringement of his patent, particularly in the use of a sliding door, and the Plaintiff filed his bill to restrain the Defen-

(1) 2 De G. & J. 582. 4 Jur NS 740
(2) 4 De G. & Sm. 444.
(3) 8 E. & B. 1004. 4 Jur NS 947
(4) 12 W. R. 723.

dant from infringing the patent. Issues were directed and tried by the Vice-Chancellor *James*, who found that the patent of 1865 was a valid patent as to the arrangement and combination of the parts, but that the sliding door was not novel, and that the Defendant had not infringed: as reported (1), where the specification and the effect of the evidence are fully set out. It was in evidence that sliding doors had before 1864 been applied to cylindrical lamps.

The Plaintiff now moved for a new trial by way of appeal.

The Defendant also moved for a new trial as to the validity of the patent.

Mr. *Webster*, Q.C., Mr. *Kay*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

The Plaintiff has a patent for a complicated process, and each part of it is protected: *Lister* v. *Leather* (2). The slide is, at all events, a new and skilful adaptation, and we contend that it is novel, as a sliding door had never been applied to a spherical lamp. In fact, the door itself is new; no door was mentioned in the first patent. Moreover, the mechanical arrangement of the door is new.

Mr. *Amphlett*, Q.C., and Mr. *Bagshawe*, for the Defendant, were heard in support of their own motion only.

Nov. 12. LORD HATHERLEY, L.C.:—

I think I must follow the Vice-Chancellor in both his decisions, and I think that as to the infringement the Defendant is protected by the doctrine of *Harmar* v. *Playne* (3). Of course *Harmar* v. *Playne* was decided long before *Foxwell* v. *Bostock* (4), and it might be open to consideration whether different views prevailed in *Foxwell* v. *Bostock* from those which prevailed when *Harmar* v. *Playne* was decided; but I think there is so much good sense and justice in the doctrines established by *Harmar* v. *Playne* that it is not a case which ought to be easily impeached by a later decision.

(1) Law Rep. 8 Eq. 358.
(2) 8 E. & B. 1004. 4 Jur. N.S. 947
(3) 11 East, 101.
(4) 12 W. R. 723.

L. C.
1869
PARKES
v.
STEVENS.

It is admitted that spherical lamps had been used long before 1862, but the Plaintiff claimed by his first patent to have made the frames with great ingenuity, and lighter than frames had previously been made. Then in his second patent he professes to have improved upon his first patent.

As to the validity of his second patent, which has been disputed, there is a clear line marking off the old from the new in a manner which could not be mistaken by anybody properly understanding the English language, and no one would be obliged to have recourse to further investigation (which was the ground of the decision in *Foxwell* v. *Bostock* (1)) in order to know what parts he might take, and what parts he might not take, under each patent. I think, therefore, that there is no objection to the specification upon that ground.

Then as to the other issue, whether the subject matter of the patent is new, I think, from the exhibits, as well as from the evidence, that this was a new and ingenious method of making a lighter description of lamp, both lighter in its appearance and lighter in the sense of transmitting light, than any which had been previously contrived.

And then we come to the question whether or not the improvement which the Plaintiff has described in his second patent, being an improvement which results in a claim for the combination of the whole, is one which is within the principle of *Lister* v. *Leather* (2), and is in itself such a novelty as to induce the Court to hold that what the Defendant has done is an infringement of the patent.

Then as regards the door, the question arises whether there is an infringement; and it is said that, according to the doctrine of *Lister* v. *Leather*, if there is a patent for a combination of parts free from the vice of mixing up old and new parts, so that a person cannot distinguish the one from the other, as was the case in *Foxwell* v. *Bostock*, then other makers are not entitled to take that which is new.

In order to arrive at a sound conclusion upon that branch of the subject, we must consider whether this door is really new, and the best way of testing that, no doubt, is that which the Vice-Chancellor has adopted—by asking whether, upon the evidence, it could by itself have been the subject of a valid patent. The patentee did not, I think, intend to claim so much, and if he had done so, and it had then been proved that the sliding door was not novel, his patent would have been vitiated. But he has not put it in that way, and he says simply, "I declare that what I claim as my invention, to be protected by the hereinbefore in part recited letters patent, is the arrangement and combination of parts hereinbefore described." Still his case might, as it was argued, fall within *Lister* v. *Leather* (1), and if this door was plainly and manifestly a new part, forming part of the whole combination, it ought not to be taken.

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(1) 12 W. R. 723.

(2) 8 E. & B. 1004.

4 Jn. 4 1947

Now as regards this door, the invention is, that instead of putting hinges to the door he makes it slide by a contrivance which is ingenious enough, and well adapted to make the pane of glass slide without interfering with the light. But his patent is for a lamp the frame of which shall throw little or no shadow, and yet at the same time possess the requisite strength, and also facilities for lighting and cleaning. No doubt the door is advantageous in cleaning the lamp, but for that purpose a sliding door is no better than a hinged door, and it has only been introduced to avoid breakage, to which the hinged doors were liable.

It was argued before me that the sliding door was in itself a novelty as applied to a spherical lamp, but many instances were given of glass in the shape of a cylinder having been made to slide over glass, and it is impossible to say that a sliding door can be the subject of a patent merely because it is spherical and not cylindrical, and on that subject I entirely agree with the Vice-Chancellor.

I think the second patent is good because the sliding door is not claimed as a novelty and the patentee only claimed to use a well-known mode of closing an aperture as the best means of closing the doorway in his lamp, and I think that the sliding door is not new.

I must therefore dismiss both motions, but without costs.

Solicitors: Messrs. *Pemberton & Reeves*; Mr. *J. M. Taylor*.

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(1) 8 E. & B. 1004. [illegible] H. L. [illegible]

L. C.
and L. J. G
1869
Nov.
5, 8, 9, 10;
Dec. 8.

13 Eq 247
3 Ch D 430-6
437-8 444-4
19 Ch D 500

TOPHAM *v.* DUKE OF PORTLAND.

Fraud on Power—Void Appointment—Intention—Motive of Appointor.

A settlor by deed declared that trustees should hold certain funds after his death upon trust for his daughters, *H.* and *M.*, or one of them, as his son should appoint, and in default of appointment should pay the dividends to *H.* and *M.* in equal shares during their joint lives, with remainders over.

At the time when the settlement was made, the settlor objected to the proposed marriage of *M.*, and made the settlement in order that in the event of the marriage the income should be appointed as to one-half for *H.*, and as to the other half, to be dealt with according to circumstances.

After the death of the settlor *M.* married, and the son thereupon appointed the income of the whole fund to *H.* for her life, reserving a power of revocation. *H.* was not informed that the appointment had been made, and it was shewn that the intention of the son and of *H.* was to accumulate one moiety of the income and hold it in suspense. In a suit instituted by *M.*, this appointment was declared void as a fraud upon the power.

The son then executed a second deed of appointment, appointing the income to *H.* during the joint lives of herself and *M.* absolutely. *H.* was informed that this appointment had been made, and she and the appointor deposed that there was no agreement between them as to the disposition of the income:—

Held (affirming the decree of *James*, V.C.), that, under the circumstances, the second deed of appointment was void.

A SERIES of transactions preceding those which formed the immediate subject of this suit may be thus stated:—

In 1843 the late Duke of *Portland* became aware that his youngest daughter, then Lady *Mary Elizabeth Cavendish Bentinck*, had entertained proposals of marriage from Sir *William Topham*, then Colonel *Topham*. The Duke disapproved of the match, and Lady *Mary* promised not to marry during her father's lifetime.

By a voluntary deed dated the 24th of June, 1843, the late Duke entered into a covenant with his three sons, the present Duke, Lord *George*, and Lord *Henry Bentinck*, to transfer into their names £52,000 New £3½ per Cent. Consolidated Annuities upon trust to accumulate the dividends during his life, at compound interest, and after his death to hold the fund and the accumulations upon trust for his daughters Lady *Harriet Bentinck* and Lady *Mary*, or one of them, and their issue, as the Duke of *Portland* for the time being should appoint; and in default to pay the dividends to them in equal shares during their joint lives, with remainder to the survivor for life, remainder to the Duke of *Portland*. This fund was transferred accordingly, and part was afterwards sold and laid out on mortgage, leaving £21,400 New £3¼ per Cents.

By another voluntary deed, dated the 24th of November, 1848, the late Duke limited his *Marylebone* estates to *Charles Heaton Ellis* in fee, upon trust, after the death of the late Duke, to raise certain annuities therein mentioned, and subject thereto, to hold the estates in trust for the Duke absolutely. Amongst these was an annuity of £2720, which Mr. *Ellis* was directed, during the joint lives of Lady *Harriet* and Lady *Mary*, to raise and pay to the present Duke and Lord *Henry* and the survivor of them, to the intent that they should pay the same to Lady *Harriet* and Lady *Mary* in such shares and proportions, or to the exclusion of either, as the present Duke during his life, and afterwards Lord *Henry*, should appoint, and in default in equal shares.

On the 27th of March, 1854, the late Duke died.

By two deeds-poll, both dated the 21st of September, 1854, the present Duke appointed that until the 1st of March then next the income of the £52,000 (formerly New £3½ then) £3¼ per Cent. Consolidated Annuities, and until the 1st of December then next the £2720 annuity, and the accumulations thereof, should be paid to Lady *Harriet* "for her own sole use and benefit," but subject to powers of revocation and new appointment.

Shortly after the date of these appointments, the dividends of the £52,000 stock and the arrears of the £2720 annuity, then due, having been paid in to the account of the Duke and Lord *Henry* as trustees, were by their order carried over to an account in their names marked "*S*" (meaning sisters); and to this same account all subsequent receipts of income in respect of the same fund and annuity were carried.

On the 4th of October Mr. *Ellis* wrote and sent to Lady *Harriet* the following letter:—

"Dear Madam,—I have the honour to enclose an order for your Ladyship's signature, and in doing so I should explain that the Duke lately executed deeds revocable at any time, but under which no payments beyond £600 a year can for the present be made to Lady *Mary*. The half year's dividend on £21,400 £3¼ per cents. will this month be paid to your credit by the trustees, as well as £680, less property tax, for the quarter's double annuity. The arrangement made, which will be completed by the enclosed order (setting aside and making a fund for future disposal), has appeared to be the best, if not the only mode of faithfully carrying into effect the late Duke's views and intentions."

On the 5th of October, 1854, Lady *Mary* married Sir *William*, then Colonel *Topham*.

On the 18th of October, 1854, Lady *Harriet* signed the order enclosed in Mr. *Ellis*'s letter, which was an order directing the bankers to invest one-half of the payments in future to be made to her credit from the joint account of the Duke and Lord *Henry* marked "*S*," in the purchase of consols in the names of the Duke, Lord *Henry*, and herself. This order was taken to the bankers; and on the 19th of October the two last-mentioned sums were transferred to Lady *Harriet*'s account. On the 20th one moiety of the funds so transferred was invested in the three names; and on the 28th of October the Duke, Lord *Henry*, and Lady *Harriet* empowered the bankers to receive the dividends on the consols so purchased, and accumulate them till further order.

On the 19th of December, 1854, the Duke executed two other deeds-poll, whereby, after reciting the fact of Lady *Mary*'s marriage, he appointed the income of the £52,000 (formerly New £3¼ then) New £3 per Cent. Annuities, and the annuity of £2720, and the accumulations thereof, as to the former to Lady *Harriet* "absolutely," reserving to the person who, during the lives of Lady *Harriet* and Lady *Mary Topham*, should be Duke of *Portland*, powers of revocation and new appointment; and as to the latter, to Lady *Harriet* "wholly and exclusively," reserving to the Duke for life, and afterwards to Lord *Henry*, and the personal representatives of the survivor of them, powers of revocation and new appointment.

It did not appear that the execution of these (permanent) appointments was ever communicated to Lady *Harriet*.

On the 13th of July, 1860, a suit of *Topham* v. *Duke of Portland* was instituted by Lady *Mary Topham* to have certain appointments made by the late Duke of *Portland* in 1848, and those of 1854 above-mentioned, set aside, as being frauds on the power in exercise of which they were purported to be made.

L. C.
and L. J. G.
1869

TOPHAM
v.
DUKE OF
PORTLAND.

On the 30th of June, 1862, the Master of the Rolls declared the appointments of 1848 to be void, but dismissed the bill as to those of 1854: see the report (1).

On appeal to the Lords Justices, their Lordships, on the 2nd of May, 1863, made an order declaring the appointments of 1854 to be void: see the report (2).

The order of the Lords Justices was, on the 7th of April, 1864, affirmed by the House of Lords, with the variation that the declaration was to be "without prejudice to any question as to any future exercise of the powers of appointment:" see the report (3).

On the 6th of July, 1864, the Duke executed the two deeds-poll now in question, which were prepared by Messrs. *Bailey*, his solicitors. By one he irrevocably appointed that the income of the funds subject to the trusts of the indenture of the 24th of June, 1843, and appointed by one of the deeds-poll of the 19th of December, 1854 (being then a sum of £39,200 sterling, invested on mortgage, and a sum of £33,467 5*s.* 9*d.* New £3 per Cent. Annuities) thenceforth to accrue during the life of Lady *Harriet*, should be paid to Lady *Harriet*, her executors, administrators, and assigns, "for her and their own absolute use and benefit, in exclusion of the said *Mary Elizabeth Topham*, her executors, administrators, and assigns."

By the other deed-poll the Duke irrevocably appointed that the annuity of £2720 should thenceforth during the joint lives of Lady *Harriet* and Lady *Mary*, be paid to Lady *Harriet*, her executors administrators, and assigns, "for her and their absolute use and benefit, in exclusion of the said *Mary Elizabeth Topham*, her executors, or administrators."

By an order of the same date, signed by the Duke and Lord *Henry*, Messrs. *Drummond* were requested to cancel all existing orders relating to the joint account marked "*S*;" and as to back payments of the £2720 annuity, and back dividends of the £33,467 5*s.* 9*d.*, New £3 per Cents., to carry one moiety of the same to Lady *Harriet's* account and the other to Lady *Mary's*; but as to all future payments and dividends to carry the whole amount to the account of Lady *Harriet*.

(1) 31 Beav. 525. 8 Jur N.S. 1083. (2) 1 D. J. & S. 517.
(3) 11 H. L. C. 32. 10 Jur N.S. 1501

On the 1st of August, 1864, Lady *Harriet*, being then at *Carlsbad*, received a letter from Mr. *Bailey*, informing her that the Duke had irrevocably appointed to her, for her "own, sole, absolute use and benefit," during the joint lives of herself and Lady *Mary*, the whole of the £2720 annuity, and the whole of the income of the funds of 1843, with the accumulations.

In the year 1863, in consequence of the proceedings in the former suit, Lady *Harriet's* order to the bankers of the 18th of October, 1854, had been cancelled; and on the 16th of November, 1863, Lady *Harriet* had signed another order dated from *Nice*, requesting Messrs. *Drummond* to transfer to an account to be headed and kept "Lady *Harriet Bentinck*—Separate Account" the sums therein specified, which had on and since the 27th of March, 1863, been paid to her account from account "*S*;" and to transfer to the same separate account one moiety of all future sums which might be paid to her account from account "*S*; and on the 28th of May, 1864, Lady *Harriet*, being at *Florence*, signed and addressed the following letter to Messrs. *Drummond*:—" Gentlemen I have to request that you will deal with all moneys standing on my separate account, opened November, 1863, according to the signature of my solicitor, Mr. *E. S. Bailey*, and that you will also give to him any information, from my private account, of the items which have been carried over to this separate account."

These orders had been acted upon, and one moiety of the dividends and of the annuity had been carried to and was, when the bill in this suit was filed, standing to the account "Lady *Harriet Bentinck*—Separate Account;" the other moiety had been applied by Lady *H. Bentinck* to her own use.

This bill was filed on the 2nd of June, 1865, by Lady *Mary Topham*, by *John Topham*, her next friend, against the Duke of *Portland*, Lord *Henry Bentinck*, Lady *Harriet Bentinck*, Sir *W. Topham*, and *John James*.

The bill charged that the late Duke exercised great influence over his children, and that they always did and concurred in doing all acts which he required of them to carry his wishes into effect. After the execution of the deeds of the 24th of June, 1843, and the 24th of November, 1848, the late Duke communicated to his children his intention that, in the event of the Plaintiff marrying

Sir *William Topham*, the said income and annuity should be appointed by the Duke of *Portland* for the time being in such a way as that one moiety should be received by Lady *Harriet* for her own benefit, and that the other moiety should be dealt with for the benefit of the Plaintiff according to circumstances. The late Duke's children acceded to the wish so expressed by the late Duke with reference to the Plaintiff's fortune, and agreed with him to carry into effect his intentions in reference thereto.

It also alleged that, soon after the death of the late Duke, the Plaintiff's marriage being then contemplated, the Defendant, the Duke, determined to appoint the income of the fund comprised in the deed of the 24th of June, 1843, and the annuity of £2720, in such manner as that Lady *Harriet* should receive one moiety for her benefit, and that the other should be accumulated or held in suspense, to be afterwards dealt with according to circumstances.

It further charged that the appointments of 1864 were not made for the benefit of Lady *Harriet*, but for the purpose of carrying into effect the said agreement which had been come to by Lady *Harriet* with the Duke, and in pursuance of which such appointments had been made; and that the Duke executed the deeds well knowing that Lady *Harriet* would act in conformity with such agreement.

It also charged that Lady *Harriet* had not applied, and did not intend to apply, more than one moiety of the income and annuity for her own benefit, and had held the other moiety as a fund to be disposed of in accordance with the said agreement; and further, that, according to the wish of the late Duke with reference to the Plaintiff's fortune, and in performance of the said agreement, she had precluded herself, as well by agreement with the late Duke as by agreement with her brother the present Duke, not merely before, but since the appointments of 1864, from applying more than one moiety for her own benefit, and that the present Duke in like manner, before such appointments, by agreement with his late father, and with his sister, precluded himself from appointing more than a moiety of the income and annuity to Lady *Harriet* for her own benefit.

The bill prayed that the Plaintiff might be declared entitled to one moiety of the income of the funds subject to the trusts of the indenture of the 24th of June, 1843, and one moiety of the annuity of £2720, respectively appointed by the deeds-poll of the 6th of July, 1864, or that it might be declared that the appointments made by the said deeds-poll were void and inoperative as against the Plaintiff; and that the Plaintiff was entitled to one moiety of the income and annuity accrued due since the 6th of July, 1864; and that the amount thereof might be ascertained and paid to her accordingly; with consequential relief.

The Duke of *Portland* by his answer, after denying that the appointments of 1854, or any of them, were made "in pursuance of such a determination" as in the bill alleged, or that they were made by him "on the faith of, or pursuant to, or in consequence of, such an agreement as in the bill is alleged" between himself and Lady *Harriet;* proceeded to say:—

"I say that the appointments made by the said deeds-poll of the 6th day of July, 1864, were made and executed by me for the sole and exclusive benefit of the said Lady *Harriet Bentinck,* and I make out the same in manner herein appearing. It is not true that the said appointments were executed for the purpose of carrying into effect the agreement which in the said bill is alleged, but which I deny to have been come to by the said Lady *Harriet Bentinck* with myself as in the said bill is mentioned, and in pursuance of which alleged agreement the said appointments of the 21st of September and the 19th of December respectively are in the said bill alleged to have been executed; or in pursuance of any other agreement come to by the said Lady *Harriet Bentinck* with myself."

"I did not when I executed the said deeds-poll of the 6th day of July, 1864, nor do I now, know, or believe, or assume, nor had I, nor have I, any reason for assuming, that the said Lady *Harriet Bentinck* would not apply the whole, or that she would not apply more than one moiety of the annual income of the said trust funds, or of the said annuity, for her own benefit; nor did I then, nor do I now, know, or believe, or assume, nor had I, nor have I, any reason for assuming, that the said Lady *Harriet Bentinck* would, in respect of the appointments thereby made, treat and consider the other moiety of such income and annuity respectively as being not to be enjoyed according thereto, but as being in furtherance of and in compliance with the said alleged agreement with myself in the said bill mentioned, the existence of which I however deny, to be withheld and kept, or to be dealt with for the Plaintiff's benefit, or in any other manner according to circumstances; nor did I execute the said appointments on the faith that the said Lady *Harriet Bentinck* would act in the manner aforesaid. I have in my said answers filed in the suit hereinbefore referred to, said that when the said appointments of the 19th day of December, 1854, were executed I did hope that Lady *Harriet Bentinck* would not, on receiving the said income and annuity so appointed, proceed at once to apply the whole thereof to her own personal use and purposes. But when I made the said last appointments of the 6th of July, 1864, I had not, nor have I now, any opinion, hope, or expectation as to the manner in which Lady *Harriet Bentinck* would or will think proper to dispose of, or apply, or deal with the said income and annuity so appointed to her, and of which she is the absolute beneficial owner, so far as the appointments so executed by me and my full purpose to make her so, can make her. I do not know, and cannot answer as to my knowledge, information, or belief, whether it is, or is not, the fact, that Lady *Harriet Bentinck* does not apply, or does not intend to apply the whole, or whether it is or is not the fact that she does not apply or does not intend to apply more than one moiety of such income and annuity for her own benefit . . . ." And in an affidavit filed by the Duke, he said that, except from the statements in the bill, he had not received any information or intimation, direct or indirect, whether Lady *H. Bentinck* had or had not given any orders or directions respecting the property, nor as to the manner in which she had dealt or would be likely to deal with it.

Lady *Harriet Bentinck* by her answer admitted that the deeds of 1864 were executed by the Duke without any previous communication, by writing or otherwise, between her and the Duke, and without any previous intimation that the Duke intended making the same, or any other appointments of the income and annuities. She was absent from *England* at the time, and the first information she received of the execution of the deeds was by a letter from Mr. *Bailey*, of the firm of *Bailey, Shaw, Smith, & Bailey*, who also in general acted as her solicitors. But she had no reason to

L. C.
and L. J. G.
1869
Topham
v.
Duke of
Portland.

believe that the Duke had any other intention than that the deeds should operate according to the tenor and effect therein expressed. She denied that they were executed to carry out any agreement between herself and the Duke. She signed the order of the 16th of November, 1863, because it was obvious that in the event of her appeal being unsuccessful she should have to account to the Plaintiff for a moiety of the moneys. She denied that she held a moiety of the income and annuity upon any trust, and as to her intended application of the moneys, she intended to dispose of them as she thought fit, at her sole will and pleasure.

Lady *Harriet Bentinck*, in cross-examination, said: "When I opposed Lady *Mary's* claim in the former suit, I did so to carry out my father's intentions. He told me so solemnly that she wasn't to have the money that I could not conceive her trying to get it—I mean if she married Mr. *Topham*. On that occasion the present Duke's lawyers acted for me, and they do so in this suit. The Duke paid all the expenses in the last suit. I believe the Duke pays the expenses in this suit. I have adopted what Messrs. *Bailey* did in this matter. My brother paid for it, and I adopted it. I knew that they were carrying out the late Duke's wishes and the present Duke's wishes. I left the whole matter to the lawyers, and I think that is the usual thing to do. In signing the order of the 16th of November, 1863, I did not think whether I was carrying out the late Duke's wishes. I left it entirely to Mr. *Bailey* . . . The money is now entirely my own . . . My brother has made over the money to me unconditionally, and I have not thought whether I am carrying out the late Duke's wishes . . . I knew that, as a general thing, what my brother did was according to my father's wishes. I did not consider I was bound in honour to carry out that arrangement. I did not think at all about it. It was my brother's business, and not mine."

Amongst the evidence produced were three letters from Lady *H. Bentinck* to Lady *M. E. Topham*, without date, but apparently written in 1860, containing the following passages:—"I can assure you that your income has never been offered to me, and mine could not have been doubled without my being aware of it." "To satisfy you, I have inquired. I receive nothing, and no one does; it accumulates, just as I told you I believed it did." In another letter, after stating some proposed arrangements between the late Duke, the present Duke, and herself, she said: "At first, my father would not agree; but after two or three days he allowed that it might be disagreeable and an annoyance to me, and he would not press my being a party, and I had nothing more to do with their arrangements."

Lord *Henry Bentinck* was examined as a witness in the former suit, and said he was told by Lady *H. Bentinck* that originally it was the intention of the late Duke to place the money in her name, and not in that of Lord *H. Bentinck's*, as the Duke's confidence was in her; but that she had refused. And that Lady *H. Bentinck* had told him that she had agreed to carry out the late Duke's wishes. He further said that he was a dummy in the late Duke's hands.

The suit came to a hearing upon motion for decree before the Vice-Chancellor *James*, who, on the 7th of June, declared the appointments of 1864 to be illegal and void (1).

(1) 1869. June 7. SIR W. M. JAMES, V.C.:—

The late Duke of *Portland* was minded to place a very large sum of money in trust for his two daughters, Lady *Mary* and Lady *Harriet*, subject to a power of appointment in his son, the present Duke of *Portland*.

In making that settlement and giving that power, the Duke had certain motives, objects, purposes, and wishes, of which he made the present Duke, and, to a certain extent, Lady *Harriet*, the "depositaries." He did not, however, embody these in the written document which, and which only, it is competent for a Court of Law or a Court of Equity to regard; and, construing that document as it must be construed by the ordinary rules applicable to such instruments, the Court is compelled to hold that the Duke had no such motive, object, purpose, or wish, in making such settlement and giving such power. The Defendants, however, persistently regarding those wishes which, in spite of all that lawyers have said or can say, they with filial reverence hold binding upon them *in foro conscientiæ*, have involved themselves in the past and present litigation to which that settlement has given rise.

In the year 1854, the present Duke, in exercise of his power, at first temporarily, and afterwards permanently, appointed the whole of the property to Lady *Harriet*, to the exclusion of Lady *Mary*. These deeds were executed without any bargain with Lady *Harriet*, and without any promise by her. The House of Lords, however, affirming the decision of the Lords Justices, having regard to the whole history of the transaction, the motives, purposes, and objects of the appointor, the position of the appointee, and the relation and understanding existing between the Duke and Lady *Harriet*, determined that the deeds of 1854 were what, in our technical language, is called a fraud upon the power, and were therefore void.

BIBL. LONDIN UNIV.

The Duke of *Portland* and Lady *H. Bentinck* appealed.

Mr. *Bailey*, who was employed in the preparation of the second set of appointments, gave no evidence in this suit. On the appeal

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After that decision the Duke, in 1864, executed other deeds of appointment, again appointing the whole to Lady *Harriet.* The only difference between the deeds of 1854 and 1864 is, that the former were expressed to be revocable, the latter are expressed to be irrevocable. I cannot, however, find in the judgments either of the Lords Justices or of the House of Lords any trace of their decision being based on the fact that the deeds of 1854 were revocable. The permanent appointments of 1854 do not appear to have been communicated to Lady *Harriet,* but that was a slip—an unintentional omission of a formality; and the omission was only important as affording corroborative evidence of how unsubstantial the whole transaction was.

It is to my mind clear that if the deeds of 1864 had been made in 1854, whether in substitution for or in addition to the deeds then actually executed, and if there had been the formal communication of them to Lady *Harriet,* the result of the litigation would have been precisely the same.

The only other circumstances, which I can see, distinguishing the deeds of 1864 from the deeds of 1854 are:—

First: That all the parties are ten years older, and that Lady *Mary* and her husband, whose enjoyment of the property *jure mariti* was the thing sought to be prevented, have lived ten years more of wedded life.

Secondly: That there was the former litigation between the donee of the power and one of the objects of it, in which the donee of the power was defeated.

Besides those two circumstances, and the fact that other pieces of parchment or paper have been engrossed, and signed and sealed and delivered by the Duke, I can find nothing to distinguish the position of the parties on the day after the second deeds were executed from that in which they were on the day after the execution of the first deeds.

The lapse of ten years, and the uninterrupted continuance of Lady *Mary's* wedded life during those ten years, cannot be prejudicial to her; and, assuredly, the fact that the donee of the power has been defeated in litigation with an object of the power, is not one to give additional validity to the exercise of a fiduciary discretion intended to be to the prejudice, and operating in punishment, of that object.

It has been pressed upon me, more especially by the counsel for the Duke, that I cannot decide in favour of the Plaintiff without holding, either,—first, that the appointments already made in favour of Lady *Harriet* being tainted with illegality by reason of the circumstances under which and the purposes for which they were made, it was impossible for the Duke to make fresh appointments in her favour free from the same taint of illegality; or, secondly, that I must discredit the statements made by the Duke's answer and affidavit.

I do not find myself under any obligation to accept either alternative. As to the first, without saying that it is impossible to set what was wrong right, and to make any subsequent appointment free from the taint, I hold that it was necessary, in order to set it right, that something should have been done and said, clearly, unambiguously, and sufficiently, to disconnect the new apin this suit, the Appellants proposed to put in an affidavit by him, and to give the Respondents an opportunity to cross-examine him, but this the Respondents refused.

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pointment from the old understanding —from the old purpose—from the old influences—which rendered the old appointment illegal and void; and that merely executing a new deed, and sending a dry, formal, official lawyer's letter to the appointee, informing her of the new appointment, and of the legal effect of the instrument, were not sufficient for the purpose.

And, on the second point, I hold that every man must be presumed to intend and mean that which is the natural and and necessary effect of his acts.

Now, when the new deeds of appointment were made, things stood thus:—

The Duke had said in his answer in the former suit, this:—"When the said deeds-poll of the 19th of December, 1854, were executed by me, I fully intended that from and after the execution thereof the Defendant, Lady *Harriet Cavendish Bentinck*, should receive the whole of the dividends or income and annuity thereby appointed to her; and I was aware when and before such appointments were made that the said Defendant, Lady *Harriet Cavendish Bentinck*, would have, and I intended that she should have, the power, if she thought fit to exercise it, of dealing with and disposing of the whole of the dividends, yearly income, and annuity, as her own moneys. But the said appointments were made in consequence of the marriage of the Plaintiff, and as the only mode by which, as I was informed, the immediate and absolute vesting in the Plaintiff of a share of the dividends or income and annuity so appointed could be prevented; and I did hope, when the said appointments were executed, that the Defendant, Lady *Harriet Cavendish Bentinck*, would not, on receiving the said dividends or income and annuity so appointed, proceed at once to apply the whole thereof to her own personal use and purposes, but as to a moiety thereof would set apart the same as a fund to be dealt with in accordance with the wish of the said late Duke, in the event (which has occurred) of the Plaintiff's marrying the Defendant, Sir *William Topham*."

Lady *Harriet* knew that he had so said, and the Duke knew that she knew it.

In Lord *Henry Bentinck's* evidence in the former suit, this appears:—"When I say that I have heard and believe that Lady *Harriet* also gave her consent to a similar proposal, I mean that I heard it direct from Lady *Harriet* last July. She told me that she had agreed to carry out the late Duke's wishes." And the Duke knew, or must be taken to have known, that she had so agreed.

Nothing was said or done before or at the time of the new appointment to get rid of the effect of what had been so said by the Duke, and agreed to by her. The new deeds, therefore, must be read with reference to what had been so said and agreed to; and they were made by an appointor who had stated what his hope was, and what the wishes of the late Duke were, to an appointee who had agreed with the late Duke to carry out those wishes. It is impossible to regard any cesser of hope or wish, or any change of motive or wish, if any such cesser or change there was, in the recesses of the Duke's own mind, not communicated to the appointee; and

Mr. *Amphlett*, Q.C., Mr. *T. Stevens*, and Mr. *B. M. Smith*, for Lady *H. Bentinck*:—

The case made by the Plaintiff is, that there has been an actual agreement between the Duke and his sister. But that has not been made out, and is positively denied on oath by both of them, and why should they be disbelieved? As to motive, is the Court to speculate in each case what may have been in the mind of the appointor? A father may know perfectly well that one of his sons will devote the money to building a church, which may be exactly what the father might desire to be done; but an appointment to that son could not be set aside on that ground. It has never been decided that an appointment is bad because the appointor knows

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the new appointments must, in all Courts of law, and for all legal purposes, be considered to have been made to Lady *Harriet* for the purpose of carrying out the late Duke's wishes, and because she had agreed to carry out such wishes; and the Duke must be held to have known that Lady *Harriet* would of course receive such new appointment as bound, morally and in honour, by such agreement. And what to my mind is absolutely conclusive as to this case is, that Mr. *Bailey* has not been called as a witness. In the former suit there was the fullest, most unreserved communication of all that had taken place with, and had been done by, the legal advisers of the Duke. In the present case Mr. *Bailey* was, for all practical purposes, the Duke. Mr. *Bailey* was, for all practical purposes, Lady *Harriet*. The deed could not have come into existence without some suggestion or communication from or to Mr. *Bailey*. But there is absolute reticence on the part of Mr. *Bailey*. Mr. *Bailey* knew, as certainly as anything depending on mere moral certainty can be known, that Lady *Harriet* would be governed entirely by him, the Duke's solicitor, as to what she would do with the money. And there was the order still in force to the bankers to deal with the appointed money as Mr. *Bailey* should direct. It was essential, therefore, to know what Mr. *Bailey's* intention, purpose, object, and views with respect to the fund were; for Mr. *Bailey's* intention, purpose, object, and views were the Duke's, and Mr. *Bailey*, it is clear, has no evidence to give which would be favourable to the validity of the appointment. Mr. *Bailey* knows everything, and says nothing.

All the material and relevant circumstances on the day of the execution of the new appointment were, in my judgment, essentially the same as they were at the time of the execution of those former appointments which were pronounced by the House of Lords to be illegal and void.

My decree, therefore, will be simply a repetition of the decree of the House of Lords, with the requisite verbal alterations and consequential directions; including, of course, a direction giving the Plaintiff and the Defendants, her husband and their trustee, the costs of the suit, as they had the costs of the former litigation.

L. C.
and L. J. G.
1869
Topham
v.
Duke of
Portland.

that the appointee means to benefit some one else: *Hinchinbroke* v. *Seymour* (1). In the former case it was considered that Lady *H. Bentinck* was a party to an agreement; here she is not. The appointment was communicated to her, and all the circumstances on which the former appointment was set aside are wanting here. It is clear that Lady *H. Bentinck* has uncontrolled power over this fund, and she is not obliged to say what she will do with it. As the former appointment was held bad, and she was obliged to refund, it is but mere prudence on her part to reserve one half of this money for fear of being called upon again to refund. No doubt the Court will look very strictly at the second appointment: *Birley* v. *Birley* (2); *Carver* v. *Richards* (3). But there is no proof whatever of any agreement between the Duke and Lady *Harriet*—in fact it is positively denied. If Lady *Harriet* does feel any moral obligation, the Duke does not know of what it consists. And if she does feel it, the Court is not justified in setting aside the appointments on that ground. In *Wellesley* v. *Mornington* (4) there was actual fraud, none is even alleged here. *In re Marsden's Trusts* (5) goes farther than any case has gone.

Sir *R. Baggallay*, Q.C., and Mr. *A. Bailey*, for the Duke of *Portland*:—

The reasons on which the House of Lords declared the appointment void are what we have now to deal with, and are not the same as those on which the Lords Justices proceeded. If the Plaintiff succeeds, the Court must hold that the Duke's statements on oath are false, or what is, perhaps, worse, true in words but not in fact. Suppose that there had been an appointment to Lady *Harriet* for life, as to one half for herself, and as to the other half on trust to dispose of it as the Duke and Lord *H. Bentinck* should appoint, then, according to the opinion of the House of Lords, that would be good, though, according to the opinion of the Lords Justices, it might not be good. If the Duke had chosen to punish Lady *Topham* for marrying, he might, in 1854, have appointed all to Lady *H. Bentinck* for herself, and he only failed because he endeavoured to give Lady *Topham* a contingent interest in part of the money. Now he does not intend her to have any interest. This appointment is irrevocable, and the Duke has no longer power to compel obedience to his wishes as he had before. If this appointment is declared void, it will be tantamount to declaring that the Duke cannot make an appointment under his power, for no future appointment will be maintainable. It has never been held that an appointment was bad because the appointee intended immediately to make a settlement, and the appointor intended her to do so. Though *In re Marsden's Trusts* (1) may have been correctly decided on the circumstances, the principle is dangerous.

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(1) 1 Bro. C. C. 394.

(2) 25 Beav. 299. 4 Jur NS 315

(3) 27 Ibid. 488; S. C. 1 D. F. & J. 548. 5 Jur NS 1412; 6 Jur NS. 411

(4) 2 K. & J. 143; 1 Jur. (N.S.) 1202.

(5) 4 Drew. 594; 5 Jur. (N.S.) 590.

Sir *Roundell Palmer*, Q.C., Mr. *C. Hall*, and Mr. *Rowcliffe*, for the Plaintiff:—

This is a mere repetition of the former transaction, with slight variations intended to evade the effect of the former decision. In both cases it is clear that the appointor has intended to act in a manner which the power will not authorize, and Lady *Harriet* knows, as she did on the former appointment, that she is a mere instrument to carry into effect the intentions of the Duke. The power of revocation was merely omitted in order to make a distinction. The Duke never announced his intention to appoint, and the only information Lady *Harriet* gets is a mere formal letter from the solicitor, obviously sent to avoid the difficulty of the former case. The Duke may feel himself morally bound to act as he has done, but he can only act as the power authorizes him, according to the rules of this Court. It has been argued that you may make an appointment on condition; but then it must be authorized by the power, and not depend on an agreement with the appointee. When once it is shewn that such an intention is to be effected by any agreement or understanding, then the appointment fails. No doubt an appointment for life or years might be made, but there is no power to direct an accumulation. The Duke has never said what his intention really was.

Mr. *Kay*, Q.C., and Mr. *Morris*, for Lord *H. Bentinck*.

(1) 4 Drew. 594. 5 Jur NS 590

L.C.
and L. J. G.
1869
TOPHAM
v.
DUKE OF
PORTLAND.

Mr. *Jessel,* Q.C., and the Hon. *W. Bethell,* for other parties.

Mr. *Amphlett,* in reply:—

No doubt the Duke would desire his sister to comply with his father's wishes, but there is no agreement and no understanding on the subject. There is no case in which an appointment has been set aside because the appointor knew that the appointee would give a share to some one else. If in *Wellesley* v. *Mornington* (1) the appointment had been made for the benefit of anyone except the appointor, it would have been good.

Dec. 8. LORD HATHERLEY, L.C., stated the facts of the case, and that there could be no doubt that the intention of the Duke in making the settlements in question was to prevent the marriage between his daughter and Colonel *Topham,* and to leave it in the power of the present Duke and Lord *H. Bentinck* to withdraw the whole of the Plaintiff's share from her. His Lordship then stated the proceedings in the former suit up to the decision of the Lords Justices, and continued:—

I think it well to pause here in order to shew what constituted, in the judgment of the Lords Justices, the vice that rendered inoperative the exercise of the powers of appointment.

They were of opinion that whatever may be the intention of the donor of a power, such intention can only be dealt with as it is expressed in his deed, and that the power must be exercised within the limits which the deed creating it prescribes. This proposition has not been disputed.

Secondly, they were of opinion that the deeds creating the two powers in question did not authorize an entire suspension of the enjoyment of the fund for the purpose of accumulation during an indefinite period. And I think that such is the true construction of the powers, for notwithstanding the extent to which they might be exercised in behalf of issue, and notwithstanding the expressions with reference to time in the deed relating to the £52,000, yet in default of and until appointment the dividends are to be divided equally between the two daughters.

(1) 2 K. & J. 143. 1 Jur N.S. 1202

The Lords Justices were further of opinion on the facts that an appointment of the whole had been made to Lady *Harriet* without any intention of giving her any benefit in one moiety, and for the express purpose of its being accumulated, the accumulations to be disposed of as eventually her brother the Duke should direct, and that she had assented to such arrangement. And further, they held that the control of the Plaintiff's share could not be delegated to Lady *Harriet*, who was not the donee of the power.

The House of Lords appear to have decided the case on the simple ground that in reality Lady *Harriet* had no knowledge of the deeds of appointment in question, and that it was evident from the slender information communicated to her, and from the reservation of the power of revocation, that she was not intended to have any real ownership of, or control over the fund.

[His Lordship then stated the proceedings in the present suit, and that the Defendants relied on the distinctions between the second set of appointments and the first set.]

In the first place, it is said, and I think justly, that the decision of the House of Lords turned principally on the want of communication of the existence of the deeds of appointment to Lady *Harriet*, which, coupled with the power of revocation, clearly indicated that she was never intended to take any interest in the fund. On the present occasion the appointments are irrevocable; they have been communicated to Lady *Harriet*, and both she and the Duke state positively, and I have no doubt truly, that no agreement or understanding whatsoever has been come to between them as to the disposal of a moiety of the fund; further, that the orders of 1863 and 1864, as to the payment of the moneys to a separate account, were intended, and probably such was one at least of the reasons in 1863, to keep the fund secure in the event of an adverse decree; and in 1864 there was a like reason, it being thought that the Plaintiff would probably dispute the second set of appointments. An affidavit of Mr. *Bailey* has been tendered by the Appellants, but the Respondents decline to consent to its being now read, even with liberty to cross-examine Mr. *Bailey* personally. We decline, therefore, to allow it to be read.

Further, Mr. *Amphlett*, in his very able argument, has pressed upon our consideration that the House of Lords has not decided

L. C.
and L. J. G.
1869
Topham
v.
Duke of
Portland.

that even the former appointments were bad on the grounds alleged by the Lords Justices as authorizing that conclusion, and it has been urged before us, as it was before Lord Justice *Knight Bruce* and Lord Justice *Turner*, that it would be very dangerous to impeach an appointment upon the ground of motive on the part of the appointor.

I think that Lord Justice *Turner* has clearly, and with his usual accuracy, pointed out the true distinction between motive and intention (1). The Court cannot inquire into the motive, but it can inquire into the intention or purpose. And this is, indeed, the point on which I conceive our decision of the present case must turn.

If the Duke, truly preferring Lady *Harriet*, either on the ground of her sister's supposed disobedience to her father's wishes in her marriage, or for any other reason, however capricious, intended simply to give the property to her in preference to her sister, he is by the power authorized to do so.

If he, on the contrary, has not any such intention, but has executed the instruments with the intent that Lady *Harriet*, having the sole control of the fund, should abstain from dealing with it as her own, and should accumulate one moiety of it in order (according to events) either to dispose of it for her sister's benefit or to let it fall back according to the limitations in default of appointment, then I think the distinction taken by Lord Justice *Turner* between intent and motive would apply.

The difficulty of the case lies in this, that the intent is not always capable of demonstration. In cases where the nominal appointee has engaged beforehand to execute the unauthorized intent, another equitable principle, that of trust binding the conscience of the appointee, is introduced; but the existence of the intent on the part of the appointor, as evidenced by the communication to the appointee after the appointment had been made of a purpose inconsistent with the power, was, in *In re Marsden's Trusts* (2), held sufficient to vitiate the appointment, though the appointee had not, before the appointment, been privy to the arrangement.

The case before us is certainly subject to very considerable

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(1) 1 D. J. & S. 570, 571.

(2) 4 Drew. 594 5 Jur NS 570

L. C. and L. J. G.
1869
Topham v. Duke of Portland.

difficulty. I give implicit credence, as I have before said, to the statements of the Appellants in their answers. I think that nothing has passed between them beyond what is there stated. But in order to appreciate the exact position of the parties, we must, I think, have regard to all that passed before.

It is true that in some respects the proceedings in the former suit may be urged, and they have been properly urged by Mr. *Amphlett*, as placing Lady *Harriet* in full possession of all the facts, and as giving her ample knowledge of her rights under the present irrevocable appointment. It would be difficult, also, to hold that she had placed herself in such a position as to incapacitate her from accepting, under any circumstances, a gift of the whole fund. I think a valid appointment might have been made to her of that fund; but the real point for consideration is, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one half of it to her own use, and to hold the other half subject to the Duke's intentions and for his purposes, did not at the date of the last appointment, and does not now, weigh on her mind with such force as to convert her into a mere passive instrument of the Duke's intentions, and whether such her sense of moral obligation is not well known to the Duke; and if so, whether he has taken any step whatever to discharge her from it, and restore her to complete freedom of action?

He does not say he has done so, and let us therefore look to her own statements as to what her view of the case is, and whether such view was not known to the Duke whilst making the appointment:—[His Lordship here read several of the passages in Lady *H. Bentinck's* answer and cross-examination set out in the statement above.]

Can it be reasonably said that this lady stands in any different position from that of Lord *Henry*, who, in one branch of the case before the Lords Justices, had declared himself to be a "dummy" in the transactions in which he was there concerned? Does not Lady *Harriet* describe herself as a mere instrument to carry into effect the will of the Duke, whom she believes to be the depositary of her late father's wishes on the subject? Is this difficulty removed by the Duke's statement that there is no agreement, that he has no hope or expectation on the subject of his sister's dealing with the moiety of the fund in dispute; and is it not necessary that she should be wholly freed from the notion that she is under any moral obligation whatever to observe the Duke's wishes?

It is not for the Court to point out how this may be done after all that has passed. It is enough for the Court to say that, assuming, as I think it is bound to do, that the Duke is aware of Lady *Harriet's* mind being made up to act exactly as he wishes her to do, and she declaring such to have always been her position, some evidence is necessary of a change of that purpose of the Duke, which was first evidenced by the proceedings on the former appointment, and which has never been disavowed, because, as Mr. *Amphlett* well observed, the Duke does not desire to disavow his wishes upon the subject.

Suppose the attempt to exceed the power had been of a different character, and that the Duke, as donee of the power, knowing that the one sister was much attached to him personally, and believing that it would be right that she, rather than her sister, should share in the fund, appointed, as here, to that sister; and then suppose that the sister had deposed, as here, that she intended, in taking the property, to be governed entirely by the Duke's wishes, could such an appointment stand? I conceive certainly not. And in this Court any attempt to exceed the limitations of the power through the medium of any appointment to one of the objects of it in exclusion of the other, is equally invalid, whether the purpose of the donee be selfish, or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power.

I rely, then, on the continuing course of proceeding and continued tenacity of purpose of the donee in his several exercises of the power, the purpose being fully declared in the case submitted to counsel; I rely on the fact that the deeds which have been set aside in the former suit were so set aside because Lady *Harriet* was a mere instrument for effecting this purpose; and I rely on her present evidence, on cross-examination, that she is still a pas-

L. C.
and L. J. G.
1869
Topham
v.
Duke of
Portland.

sive instrument to effect her brother's purpose; and, lastly, I rely on the absence of all evidence to shew that she has ever been released from that position.

I think, therefore, upon the whole case, that the Vice-Chancellor has come to a right conclusion, and that the appeals must be dismissed with costs.

Sir G. M. Giffard, L.J.:—

On this appeal the validity of two deeds of appointment, dated the 6th of July, 1864, is brought in question. They are appointments purporting to be in favour of Lady *Harriet Bentinck*, and to exclude her sister Lady *Mary Topham*. On the face of them they are in conformity with the powers they refer to, and were executed by the Duke of *Portland*.

Previous deeds also executed by the Duke of *Portland*, purporting to be in exercise of the same powers in favour of Lady *Harriet Bentinck*, to the exclusion of her sisters, were the subject of a suit which came first before the Master of the Rolls, then before the Lords Justices, and afterwards before the House of Lords. The result of that suit was to set aside those deeds as invalid, because their real object and purpose was not to benefit Lady *Harriet Bentinck*, as they professed, but to bring about a state of things resulting in an arrangement not warranted by the powers. [His Lordship then referred to several passages in the evidence in the former suit.] The whole taken together amounted to this: That by the acts of the Duke of *Portland*, the donee of the powers (and the acts of his agents must be taken as his acts), an arrangement was brought about which did not appear on the face of the instruments purporting to exercise the powers, which was not in conformity with the powers themselves, and in consequence of which the deeds purporting to be appointments were held invalid and set aside. That the arrangement was founded on what the present Duke of *Portland* believed to be the late Duke's wishes, and that Lady *Harriet* assented and was willing to assent to everything which he or his advisers considered conducive to the end of carrying out of those wishes.

In this state of circumstances no new appointment by the Duke of *Portland*—the same donee—in favour of Lady *Harriet Bentinck*

—the same appointee—can stand unless the effect and influence of this previous arrangement can be proved to have been so obliterated as to have put the donee of the power on the one hand and the appointee on the other in the same position as though no such arrangement had been brought about.

In my opinion the burden of the proof requisite to support a second appointment in such a case rests, and ought to rest, on the appointee. The reasons which in the case of a dealing between a solicitor and a client throw the onus of proof on the solicitor, between a trustee and a *cestui que trust* on the trustee, between a parent and a child on the parent, and in the class of cases to which *Huguenin* v. *Baseley* (1) belongs, on the persons seeking to sustain the gift, apply with equal force as between the appointee in such a case as this and the person entitled in default of appointment.

I am satisfied from Lady *H. Bentinck's* statements in her answer and her cross-examination, that the original influence and obligation have existed, still exist, and are likely to exist.

The absence of Mr. *Bailey's* evidence has, I confess, no great weight with me; nor do I attribute more weight to Lady *Harriet's* order to Messrs. *Drummond*, directing them to deal with the moneys standing to her account, according to the signature of Mr. *Bailey;* but to Lady *Harriet's* cross-examination, coupled with the previous transactions, including Mr. *Heaton Ellis's* communications with her, and her letters to her sister, I attribute great weight. I must take it to be proved that the present Duke, through Mr. *Heaton Ellis,* did what was thought best calculated to bind Lady *Harriet* to carry out the late Duke's wishes, that she considered herself bound to do so, that the present Duke knew she so considered herself, that no step has been taken to put an end to that obligation, and that Lady *Harriet,* with reference to the appointments of July, 1864, was, and is, a mere instrument in the hands of the Duke and his advisers, willing to do whatever he and they desire in order to carry out her father's wishes with reference to Lady *Topham's* fortune.

It follows, therefore, that the appointments cannot stand, and that the appeal must be dismissed with costs.

I should have come to the same conclusion had I thought that

(1) 14 Ves. 273.

the onus of proof was on the Plaintiff; but I think it of importance to reiterate, that where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first.

I have only to add that if the object of the appointment in this case had been simply the benefit of the Duke of *Portland* himself, I am persuaded he would never have come into Court. The real object, though morally speaking far different, must, legally speaking, be considered on precisely the same principles as though he sought a benefit for himself, for the object is to bring about a state of things not warranted by the powers. It may be that on consideration the Duke of *Portland* will concur in the opinion that the matter may from henceforth be well left at rest.

Solicitors for the Plaintiff: Messrs. *Gregory, Rowcliffe, & Rowcliffe;* afterwards, Messrs. *Austen, De Gex, & Harding.*

Solicitors for the Duke of *Portland* and Lady *Harriet Bentinck:* Messrs. *Bailey, Shaw, Smith, & Bailey.*

Solicitors for Lord *Henry Bentinck:* Messrs. *Cunliffe & Beaumont.*

In re BLAKELY ORDNANCE COMPANY.

L. J. G.

1869

Nov. 19.

CREYKE'S CASE.

Forfeiture of Shares—Company—Winding-up—Contributory—Past Member—Companies Act, 1862, *s.* 38, *clause* 3.

The articles of a company provided that shares might be forfeited for non-payment of a call, and that the forfeiture of any share should involve the extinction of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share.

C. was the original holder of shares which were forfeited for non-payment of a call less than a year before the winding up of the company :—

Held (affirming the decision of the Master of the Rolls), that *C.* was properly placed upon the list of past members as a contributory.

The liability of a past member is entirely created by the *Companies Act*, 1862, and it is immaterial whether his shares have been transferred or have been extinguished by forfeiture.

Bridger's and Neill's Cases (1) held to apply.

12 Eq 3
7 Ch 584
12 Eq 348
7 Ch 57
7 Ch 835
11 Eq 427
11 Ch D 38

THIS was an appeal from an order of the Master of the Rolls made in the winding-up of the *Blakely Ordnance Company, Limited.*

Mr. *Creyke,* the Appellant, was the original allottee of forty shares in the company. On the 25th of November, 1865, these shares were duly forfeited for non-payment of a call. The call was subsequently paid by Mr. *Creyke.*

The clauses in the articles of association which related to the forfeiture of shares were the following :—

Art. 48. "After one month's non-payment of any call in respect of any share, the board may declare the share forfeited for the benefit of the company."

Art. 50. "The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of such forfeiture.

Art. 51. "Forfeited shares may be sold or absolutely extin-

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(1) Law Rep. 4 Ch. 266.

L. J. G.
1869
CREYKE'S CASE.

guished by the board as they shall deem most advantageous to the company."

Before the expiration of a year from the date of the forfeiture of the shares the company was wound up by order of the Court, and the official liquidator having ascertained that there were debts due from the company still unsatisfied which were due before the forfeiture, which the contributions of the present members would be insufficient to satisfy, had Mr. *Creyke's* name placed on list B. of contributories as a past member of the company. The Master of the Rolls held that he was rightly placed upon the list. and from this decision Mr. *Creyke* appealed.

Mr. *Jessel*, Q.C., and Mr. *Speed*, for the Appellant:—

The determination of the question in this case must depend upon the contract between the shareholders and the company. The Master of the Rolls relied upon *Bridger's and Neill's Cases* (1); but the provisions of the articles were different in those cases. They simply provided that forfeiture should extinguish the rights of the shareholder against the company in respect of his forfeited share; but the 50th article in the present case provides that "all other rights incident to the share" shall be extinguished: *Stocken's Case* (2). The 38th section of the *Companies Act*, 1862 (3) is not inconsistent with this provision. That section can only mean that a past member can only be made to contribute in respect of *existing* shares; whereas in this case the shares were not existing, but were altogether extinguished. *Bridger's and Neill's Cases* also differ in this respect, that there the persons sought to be charged were transferors of the forfeited shares. In the present case the person to be charged was the holder at the time of forfeiture. The transferring shareholder is in a different position, for he would be liable at law as in an ordinary partnership. The Act did not create a fresh liability in his case, but only provided that he should not be released by the *quasi* corporate nature of the company. But in the case of the holder of a forfeited share there is a special contract that he should be released from liability. And it would be a strange result of the statute if a person who by forfeiture had lost all liability upon his share, could become liable again by means of a subsequent winding-up. There would also be great difficulty in adjusting the rights of the past holders of forfeited shares and the past holders of existing shares in case a call were to be made, not for payment of debts, but for adjusting the contributions of contributories *inter se.*

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(1) Law Rep. 4 Ch. 266.

(2) Ibid. 3 Ch. 412.

(3) 25 & 26 Vict. c. 89, s. 38 (3): "No past member shall be liable to contribute to the assets of the company, unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the official liquidator, were not called on.

SIR G. M. GIFFARD, L.J. :—

I quite agree that the facts of this case and those of *Bridger's and Neill's Cases* (1) are not identical, but though there is a distinction in the facts, in principle there is none. The difference between *Bridger's and Neill's Cases* and this case is, that though there the shares had been forfeited, the parties whose names were sought to be placed on the list were persons who had transferred their shares, while in this case the gentleman whose name is sought to be put on the list has simply had his shares forfeited; and there is also a somewhat different clause as to forfeiture in these articles from that which there was in *Bridger's and Neill's Cases.* No doubt, in the present case, the shares were extinguished by the forfeiture, and the company had a right to re-issue them if they could get anyone to take them, and as between the company and the members, apart from the *Companies Act*, the only liability was, that the member was bound to pay the calls made on him antecedently to the forfeiture. But apart from the *Companies Act* the position of the company with respect to a transferor would be just the same as it would be with respect to a person whose shares had been forfeited. In neither case could the company, according to the ordinary articles of association, proceed against a transferor. The result, is that this liability of a past member is a liability entirely created by the statute, and by nothing else.

That being so, let us see whether the 50th clause of the articles

(1) Law Rep. 4 Ch. 266.

L. J. C.
1869
Creyke's Case.

was meant to put an end to what the statute provides. I certainly should hesitate before I decided that a clause which went in the direct teeth of the statute was good for anything at all; but this clause does not go in the direct teeth of the statute—it is quite consistent with it. You must take the articles as they stand—you must take the statute as it stands, and read them both together, and then see what is the liability. If you do this the conclusion will be, that by the 50th clause of the articles the share will be extinguished by forfeiture, but if there is a winding-up within a year the liability continues to pay all debts due at the time of the forfeiture. *Bridger's and Neill's Cases* (1) are decisions that there need not be existing shares in order that a past member may be made liable in respect of shares. Those cases also decide that the amount in respect of which the member is liable is the amount (if any) which has not been paid, and they further decide this, as plainly as a case can decide anything, that what you have to look to is the original contract of the shareholder in respect of the shares. You have, then, to consider whether the shareholder has ceased to be a member for more than twelve months, and whether any other person is liable in respect of these particular shares, and if so, you must exhaust him before you can come upon the past member. But if it be the case, either that the shares are transferred, and the person who is a member in respect of them is unable to pay, or if the shares do not exist at all, then, beyond all question, after all the existing members have been exhausted, the past member is liable.

I feel no difficulty on account of the argument which Mr. *Jessel* and Mr. *Speed* have urged with reference to the contributions by contributories *inter se*, and with reference to the 3rd division of the 38th section of the Act. As to contributions by contributories *inter se*, if you have twenty past members, all of whom have been made contributories, and whose contributions would have to be settled *inter se*, it is the settled practice that you may make calls upon past members before you have made the list of past members complete, and you may make calls in such a way as that a man may be obliged to pay a given sum and afterwards recover that given sum from others in the same category as himself. Therefore, that makes no difficulty.

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(1) Law Rep. 4 Ch. 266.

Then as to the 3rd subdivision of the 38th section, that was held to create no difficulty in *Bridger's and Neill's Cases* (1), and it certainly creates no difficulty here :—[His Lordship read the clause.] That clause means simply this, and nothing else, that the liability of past members shall be secondary to the liability of existing members—that you must exhaust all the existing members before you go to the past members, but when they are exhausted you may go on to the past members, and it matters not whether there are existing shares or not. Forfeiture and transfer have for this purpose the same effect. Therefore this appeal must be refused with costs.

Solicitors for the Appellant: Messrs. *Taylor, Hoare, & Taylor.*

Solicitors for the Official Liquidators: Messrs. *Lewis, Munns, Nunn, & Longden.*

In re POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY.

L. J. G.
1869
Dec. 10.

Scheme of Arrangement—Jurisdiction—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 7, 9—*Restraining Execution by Debenture Holder.*

7L 177

The 7th and 9th sections of the *Railway Companies Act*, 1867, give only an interim power to the Court with respect to proceedings by creditors between the filing and the inrolment of a scheme of arrangement. After the inrolment the company cannot obtain an injunction either against outside creditors or creditors bound by the scheme, except upon a bill filed.

A debenture holder obtained judgment at law before the passing of the *Railway Companies Act*, 1867, and issued execution after the inrolment of a scheme of arrangement under the Act by which all debenture holders were bound. The creditor moved for leave under the 9th section to levy execution, and the company moved under the 7th section to restrain him and the sheriffs from further proceedings. Both motions were dismissed with costs.

But *semble*, the creditor was bound by the scheme, notwithstanding his judgment, and if a bill had been filed he would have been restrained.

The order of *Malins*, V.C., varied.

Bowen v. *Brecon Railway Company* (2) questioned.

THIS case came before the Court by appeal from two orders of Vice-Chancellor *Malins*, made In the Matter of the Scheme of Arrangement of the *Potteries, Shrewsbury, and North Wales Railway Company.*

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(1) Law Rep. 4 Ch. 266.

(2) Law Rep. 3 Eq. 541.

The Appellant, Mr. *P. Minor*, was a debenture holder of the company, and in February, 1867, before the passing of the *Railway Companies Act*, 1867, he obtained judgment against the company on his debenture for £140, together with interest and costs. On the following day he sued out a writ of *fi. fa.* against the goods of the company, to which the sheriff of *Shropshire* made a return of *nulla bona*.

The company, being largely indebted, filed a scheme of arrangement in May, 1868. The scheme provided that the company should raise debenture stock equal to the amount of their debts, and should allot the same to all their mortgage and other creditors who were bound by the scheme in the proportion of their respective claims. More than three-fourths of the debenture holders consented to the scheme, and the scheme was duly inrolled on the 13th of July, 1868.

Minor refused to consent to the scheme, and on the 24th of September, 1869, again issued execution upon his judgment, under which writ the sheriff seized some of the engines and rolling stock of the company.

On the 20th of October, 1869, the company, on a motion in the matter of the scheme, obtained an interim order from Vice-Chancellor *James*, as vacation Judge, restraining the sheriff from selling the property, and they subsequently moved before Vice-Chancellor *Malins*, for an injunction to restrain the sheriff from continuing in possession of the rolling stock, and to restrain *Minor* from taking any further proceedings against the company under his judgment. *Minor* also made a cross motion for permission to make his execution available against the company notwithstanding the scheme of arrangement. The Vice-Chancellor, on the 18th of November, granted the injunction against the sheriff and *Minor*, and refused to make any order on *Minor's* motion. From these decisions *Minor* appealed.

Mr. *Glasse*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

There are two objections to the order for an injunction. The first is, that the Court has no jurisdiction to make such an order. No bill has been filed in this case, and this Court has no summary jurisdiction unless it is given it by the Act. The only section which gives power to this Court to restrain proceedings by creditors is the 7th (1), and it only gives an *interim* power while the consideration of the scheme of arrangement is pending, and is inoperative as soon as the scheme is inrolled: *In re Cambrian Railways Company's Scheme* (2).

The proper remedy of the creditor in this case, if he has any rights, is under the 5th section, which gives power to the Common Law Court out of which the execution issued to determine questions on an application by either party.

But we contend, in the second place, that even if this Court had jurisdiction, this is not a case in which it ought to be exercised. So far as regards Mr. *Minor's* rights as a mortgagee, he is bound by the scheme; but his rights as a judgment creditor are unaffected. In that respect he is an "outside creditor" with whose rights the scheme does not profess to deal. It would be most unjust if he were to be deprived of the fruit of his activity in obtaining judgment, which was done more than a year before the filing of the scheme: *In re Bristol and North Somerset Railway Company* (3).

[The LORD JUSTICE GIFFARD referred to *Bowen* v. *Brecon Railway Company* (4), in which it was held by the present Lord Chancellor, then Vice-Chancellor, that a debenture holder who issued execution could only do so as a trustee on behalf of himself and the other judgment creditors, and said that if the same question was involved in the present case, he should wish it to be heard by the full Court in order that the principle of that decision might be reconsidered.]

In *Bowen* v. *Brecon Railway Company* a receiver had been appointed on behalf of all the debenture holders. In the present case Mr. *Minor* was actually in possession of the rolling stock by virtue of his first writ of *fi. fa.* before the filing of the scheme. The *Companies Clauses Act*, 1845 (8 Vict. c. 16, s. 53), expressly reserves to mortgagees their right to sue for their principal and interest in the ordinary way.

With respect to our cross motion for leave to make our judgment available under the 9th (1) section of the *Railway Companies Act*, 1867, the application was made *ex abundanti cautelâ*, as it appeared doubtful whether that section applied to all creditors, or only to those who were bound by the scheme; but whether that application was strictly necessary or not, we contend that this is a case in which the Court will grant it.

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(1) Sect. 7: "After the filing of the scheme, the Court may, on the application of the company on summons or motion, in a summary way, restrain any action against the company on such terms as the Court thinks fit."

(2) Law Rep. 3 Ch. 278.

(3) Ibid. 6 Eq. 448.

(4) Ibid. 3 Eq. 541.

Mr. *Osborne*, Q.C., and Mr. *Dryden*, for the company:—

The fallacy of the argument of the Appellants lies in the assumption that they are "outside creditors." The 7th section is applicable to all creditors. It may be put in force against outside creditors during the pendency of the scheme. After the scheme is inrolled it is inoperative as to them; but the words are quite general, and it can still be enforced against the creditors who are bound by the scheme. It is independent of the 9th section, which only applies to creditors who are bound by the scheme. The Appellant is a mortgagee, and is bound by the scheme; and although he has obtained a judgment, he is still a mortgagee. The argument of hardship to him has no force; for the policy of the Act is that the creditors should surrender some of their rights for the general benefit of all who come in under the scheme. If the company had to file a bill against each judgment creditor, the expense would be enormous. It is therefore reasonable that the Court should have the power of restraining such proceedings on motion.

SIR G. M. GIFFARD, L.J.:—

This case comes before me not upon a bill filed, but on a motion under the *Railway Companies Act*, 1867. With respect to the 7th and 9th sections of that Act, Lord *Cairns*, in *In re Cambrian Railways Company's Scheme* (2), says: "I think the object and meaning of these clauses are sufficiently clear. The company is unable to meet its engagements. The scheme is expected to result in the production of new capital or loans wherewith the

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(1) Sect. 9: "After such publication of notice no execution, attachment, or other process against the property of the company shall be available without leave of the Court, to be obtained on summons or motion in a summary way.

(2) Law Rep. 3 Ch. 296.

L. J. G.
1869
In re
POTTERIES,
SHREWSBURY,
AND NORT
WALES
RAILWAY CO.

engagements may be satisfied. But if while the scheme is maturing, and the requisite assents are being obtained, the company and its property are torn asunder and destroyed by litigation and executions, the remedy proposed by the scheme will come too late. An interim power must therefore be given to the Court (up to what point that interim power may and ought to be exercised is not now the question) to stay actions on proper terms, and executions must be made dependent on the leave of the Court."

I take this to mean that the power given by these sections is an interim power only. The whole object of the Act is to give the opportunity of preparing, perfecting, and filing a scheme, which when inrolled is to have all the effect of an Act of Parliament. At this point the powers given to the Court cease, and the *status* of the railway company is fixed in the same way as though it had obtained an Act of Parliament. It could not have been intended that every person who at any time obtained a judgment against a company should be obliged to apply to the Court for leave to issue execution, because the company happened to be a company regulated by an inrolled scheme, or that the Court should be able for this reason to restrain an action *brevi manu*, and even though there should be no such equity as would maintain a bill. For the period between the filing and the inrolling of the scheme there is that which amounts to a *lis pendens*—there is both a reason and a necessity for the exercise of large discretionary powers, but on the inrolment of the scheme this reason and necessity cease. All those who are bound by the scheme can be restrained from transgressing its provisions according to the usual and proper forms and practice of the Court, whilst as against a party not bound by the scheme it cannot, after its inrolment, be right or proper to proceed on the footing of it. I therefore come to the conclusion that the powers, which are unusual and extraordinary ones, were given only for the period between the filing and inrolment of the scheme, and that after the inrolment the company, which is desirous of restraining the proceeding against it, is in the same position as any ordinary company or person, and may file a bill for that purpose.

It was argued that the 7th section had a wider operation than the 9th; I do not think that is so. I think that they both apply

L. J. G.
1869
In re
POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY CO.

to the same interval of time. I am convinced that this power was only given to the Court to enable the company to protect its property pending the scheme, if there was a reasonable expectation of obtaining the requisite assents.

I am therefore of opinion, as to these two motions, that the motion for leave to proceed with the execution was unnecessary; and that the Court had no jurisdiction to grant the injunction asked for in the other motion, and that both applications ought to have been dismissed with costs.

But the company must have an opportunity of filing a bill; and if a bill had been filed I should probably have granted an injunction. I have no hesitation in saying that a debenture holder is still a debenture holder, although he has obtained a judgment, otherwise there would be no result from a scheme of this kind. The order will, therefore, be that the injunction be dissolved from the 16th instant. There will be no costs of the appeal.

Solicitor for the Appellant: Mr. *D. Aston*, agent for Mr. *W. R. Minor, Manchester*.

Solicitor for the Company: Mr. *S. F. Noyes*.

L. J. G.
1869
Dec. 11.

42 L.J. Ch. 77
5 H.L. 330
2 Ch.D. 502
6 Ch.D. 145
22 Ch.D 615

In re CUMING.

Trustee Act, 1850, *ss.* 3, 20—*Covenant to surrender Copyholds.*

A vendor covenanted in the usual way to surrender copyholds to the purchaser, and the purchase-money was paid. The vendor died before surrender. His customary heir was of unsound mind. The covenant contained no declaration that the vendor and his heirs would until surrender hold the premises in trust for the purchaser:—

Held, that a person might be appointed under the *Trustee Act*, 1850, to convey to the purchaser, without a suit being instituted to have the heir declared a trustee.

IN 1867 *Henry Cuming* contracted to sell certain leasehold and copyhold property to the Petitioner *Frederick Slade;* and by indenture dated the 9th of November, 1867, acknowledging in the usual way the receipt of the purchase-money, *Cuming* assigned the leaseholds to the Petitioner, his executors, administrators, and assigns, and covenanted for himself, his heirs, executors, and administrators, with *Slade*, his heirs and assigns, that he, *Cuming*, would forthwith surrender the copyhold property to the use of *Slade*, his heirs and assigns, according to the custom of the manor.

Before any surrender had been made, *Cuming* died intestate, leaving a customary heir who was of unsound mind, though not found so by inquisition. *Slade* thereupon presented a Petition in lunacy intituled In the Matter of *A. Cuming*, a person of unsound mind not so found by inquisition, In the Matter of the Trustee Acts, 1850 and 1852, and In the Matter of *Frederick Slade's* Trust, praying that a proper person might be appointed to convey the copyholds to the Petitioner.

Mr. *North*, for the Petitioner, referred to the *Trustee Act*, 1850, ss. 3 and 20, and to *Re Collingwood's Trusts* (1), and contended that, though there were not here, as in that case, any words declaring a trust, still in the case of an executed contract a suit was not necessary.

Sir G. M. Giffard, L.J. :—

I think that the distinction drawn between an executed and an unexecuted contract is sound. Where there is only a contract for sale a suit is necessary to declare the vendor a trustee; but where the contract has been executed by payment of the purchase-money and a formal covenant to surrender, I think that no suit is necessary. An order will be made as prayed on production to the Registrar of an affidavit proving strictly the execution of the deed and the payment of the purchase-money.

Solicitors: Messrs. *Westall & Roberts.*

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(1) 6 W. R. 536.

L. J. G.
1869
Dec. 10.

5 Ch D 321

STONE *v.* STONE.

Statute of Limitations—Marriage Settlement—Breach of Trust on the Part of the Settlor—Covenant to settle.

By a post-nuptial settlement dated in 1814, made in pursuance of an ante-nuptial agreement, after reciting that the husband had agreed to settle £1000 in manner thereinafter mentioned, and to enter into the covenants thereinafter contained, and reciting that this sum of £1000 had been paid to *G.*, it was witnessed that *G.* covenanted with the settlor that he would hold the £1000 upon trust, with the approbation of the settlor, to invest it, in the joint names of the settlor and himself, either in the public funds or in government or real securities, and would hold the trust funds and securities upon trust for the settlor and his wife during their respective lives, and after their death upon trust for the benefit of their children; and the settlor covenanted that he would at the expiration of twelve months pay to *G.* another sum of £1000, to be held by him upon the same trusts as the first sum.

G. died in 1821, and the settlor, having survived his wife, died in 1868. Neither of the sums of £1000 were really paid to *G.*, or invested in the joint names of *G.* and the settlor:—

Held, on a claim by the children in a suit instituted for the administration of the settlor's estate: First, that the settlor had constituted himself a trustee of the first sum of £1000, and that his estate was liable for his breach of trust in not seeing that it was invested, notwithstanding the *Statute of Limitations;* secondly, that as to the second sum of £1000, the settlor was in the position of a simple covenantor, and that the remedy of the claimants for his breach of the covenant was barred by the *Statute of Limitations.*

The decision of *James*, V.C., varied.

THIS was an appeal from a decision of Vice-Chancellor *James* refusing to allow a claim on the estate of *John Stone* in the above suit.

By an indenture dated the 17th of February, 1814, and made between *John Stone*, of the first part, *Ann Sawyer Stone*, his wife, of the second part, and *Robert Gatcombe* of the third part, after reciting that the said *J. Stone* did by a certain agreement or memorandum in writing made and executed previous to his marriage with the said *Ann S. Stone*, agree to settle the sum of £1000 in manner thereinafter mentioned, and also to enter into the covenants thereinafter contained; and that the said *John Stone* had paid into the hands of the said *Robert Gatcombe* the sum of £1000 at or before the sealing or delivery of the said indenture, the payment and receipt whereof he, the said *Robert Gatcombe*, did thereby acknowledge, it was witnessed that in pursuance and performance of the said agreement entered into previous to the said marriage, and in order to make some provision for the said *Ann S. Stone* and the issue of the said marriage, he, the said *Robert Gatcombe*, for himself, his heirs, executors, and administrators, covenanted with the said *John Stone*, his executors, administrators, and assigns, that the said *Robert Gatcombe* should stand and be possessed of the said sum of £1000, and also such further sum as should be paid to the said *Robert Gatcombe* as thereinafter mentioned, upon the trusts thereinafter declared of and concerning the same, that is to say, upon trust that the said *Robert Gatcombe*, his executors, administrators, or assigns, should, with the approbation of the said *John Stone*, testified by some writing under his hand, lay out and invest the same sum of £1000 in parliamentary stocks, or in the public funds, or otherwise put and place the same out at interest on government or real securities, or on the security of lands held for any long term or terms of years absolute, in the names of him, the said *Robert Gatcombe*, his executors, administrators, or assigns, and of him the said *John Stone*, and from time to time, if the said *John Stone* should so think fit and direct by any writing under his hand, to alter and change such stocks, funds, and securities wherein the same should be lent and invested, and should pay, apply, and dispose of the interest, dividends, and proceeds to arise by or out of the said trust funds upon trust for *J. Stone* and *Ann S. Stone* during their respective lives, and after the decease of the survivor upon trust that the said *R. Gatcombe*, his executors, administrators, or assigns, should assign, transfer, and pay the said sum of £1000, and the stocks, funds, or securities, so to be purchased, unto and between the children of the marriage in such manner as the survivor of them, the said *J. Stone* and *A. S. Stone*, should by will appoint, and in default of such appointment upon trust for the children of the marriage in equal shares. And by the same indenture the said *J. Stone*, for his heirs, executors, and administrators, covenanted with the said *R. Gatcombe* that he would, at the expiration of twelve calendar months from the date thereof, pay to the said *R. Gatcombe*, his executors, administrators, and assigns, the further sum of £1000, and would sell and convert into money with all convenient speed all the real and personal estate which the said *A. S. Stone*, or *J. Stone* in her right, should during the coverture become possessed of, and pay the proceeds into the hands of the said *R. Gatcombe*, to be by him placed out at interest in such manner and upon the same trusts as were thereinbefore declared concerning the sum of £1000.

R. Gatcombe died in the year 1821. *Ann S. Stone* died in July, 1851. The present claimants, *Eliza Parish Stone* and *Georgiana Cole*, were the only children of the marriage who attained twenty-one. Neither of the sums of £1000 mentioned in the settlement was ever invested by *R. Gatcombe*, either in his own name, or in the joint names of himself and *J. Stone*, nor was either of the sums ever paid by *J. Stone*, although a bond for £1000 was given by him to *Gatcombe* for the first-mentioned sum.

J. Stone made his will, dated the 1st of February, 1867, and thereby, after reciting that by a marriage settlement made subsequently to his marriage he had the power of appointing the money thereby settled amongst his children of the marriage in such parts and proportions as he might think proper ; and reciting that the said *Robert Gatcombe* died many years since insolvent, and the trust estate became reduced to £600, which was secured by the bond of *Richard Gatcombe*, the brother of *Robert Gatcombe*, the testator appointed the said sum of £600 in certain proportions between his two children, the present claimants. The sum of £600 appointed in the will was the produce of the sale of certain property of Mrs. *Stone*.

John Stone died in July, 1868, without having made any appointment except that contained in his said will, and shortly afterwards this suit was instituted for the administration of his estate.

The children claimed in this suit to rank as creditors on *John Stone's* estate in respect of the two sums of £1000 settled by the above-stated settlement. The Vice-Chancellor was of opinion that *J. Stone* had not constituted himself a trustee of either of the two sums, and that the claim was, therefore, barred by the *Statute of Limitations*, and from this decision the claimants appealed.

Mr. *Eddis*, Q.C., and Mr. *Dumergue*, for the Appellants :—

The settlement of 1814 was not voluntary, having been made in

L. J. G.
1869
Stone
v.
Stone.

pursuance of an ante-nuptial agreement, and the present claimants, therefore, stand in the position of creditors. With respect to the first sum of £1000, *J. Stone* constituted himself a trustee of his own settlement. *Gatcombe* covenanted with him that he would invest the money in their joint names, and he became a trustee of that covenant for his wife and children. The words "with the approbation of *J. Stone*," refer to the securities in which the money was to be invested, not to the act of investing in their joint names. The money was lost through not being so invested, and *J. Stone* was, therefore, a party to the breach of trust.

As to the second sum of £1000, which *J. Stone* covenanted to pay to *Gatcombe*, he was not in the position of a simple covenantor, but of trustee also, and he was bound by an ante-nuptial agreement, and by the trusts of the settlement, to carry into effect the covenant for the benefit of the *cestuis que trust.* The *Statute of Limitations*, therefore, does not apply. *Butler* v. *Carter* (1); *Brittlebank* v. *Goodwin* (2); *Burrowes* v. *Gore* (3).

Mr. *Bristowe*, Q.C., and Mr. *Lindley*, for the executors of *J. Stone*:—

The Vice-Chancellor was right in considering that *J. Stone* did not stand in the position of a trustee of either of the sums of £1000; and the *Statute of Limitations*, therefore, is a bar to the present claim. With respect to the first sum, the investment in the joint names was a condition precedent to the commencement of his trusteeship; and the meaning of the words, "with the approbation of *J. Stone*," is, that he had the option to constitute himself a trustee or not as he pleased: he never did constitute himself a trustee, and his estate cannot, therefore, be answerable for any breach of trust.

With respect to the second £1000, he was in the position of an ordinary covenantor, and the claimant's remedy is now barred by the *Statute of Limitations*: *Wych* v. *East India Company* (4); *Spickernell* v. *Hotham* (5). There was no acknowledgment in

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(1) Law Rep. 5 Eq. 276.
(2) Ibid. 545.
(3) 6 H. L. C. 907. 4 Jur NS 1245
(4) 3 P. Wms. 309
(5) Kay, 669.

L. J. G.
1869
STONE
v.
STONE.

Stone's will of any trusteeship in himself. He refers to the sum of £600 as the only trust fund; and that he appoints.

Mr. *Eddis*, in reply, referred to *Rolfe* v. *Gregory* (1).

SIR G. M. GIFFARD, L.J.:—

As regards the second sum of £1000, I agree with the Vice-Chancellor; because there was simply on the part of *Stone* a legal obligation. The case of *Rolf* v. *Gregory* has no application. The purport of that case is simply this—that if a man holds a promissory note and agrees with the person who is liable on the note to destroy it, he becomes a trustee, and is responsible for the loss. But in the present case there is simply a legal obligation, and there is no reason why the *Statute of Limitations* should not apply.

As to the other sum of £1000, however, I cannot agree with the Vice-Chancellor. I do not think it was at the option of *Stone* whether he would be a trustee of that sum or decline to be one. If we look at the terms of the settlement we find, first, a recital of an agreement to settle £1000 in manner thereinafter mentioned, that is to say, the sum was to be paid to *Gatcombe*, but was to be invested by him in the joint names of himself and the settlor. We then come to the recital that the money was already in *Gatcombe's* hands; and then follows a covenant by *Gatcombe* with *Stone* that he would invest it with the approbation of *Stone*, in one of two ways—*Stone* being, in my opinion, bound to give his approbation to one or other of them. If he declined to give his approbation it would have been the duty of *Gatcombe* to invest it in consols. But it was not competent to *Stone* to elect whether he would be a trustee or not. He was, in fact, a trustee of the covenant, and was bound to see that that trust was carried into effect; and as he has not done so, his estate must be held bound. The decree must, therefore, be varied with reference to this sum of £1000.

Solicitor for the Appellant: Mr. *W. Compton Smith.*

Solicitors for the Respondents: Messrs. *Meredith & Co.*, agents for Messrs. *Baker & Phillott, Weston-super-Mare.*

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(1) 34 L. J. (Ch.) 274.

In re AGRICULTURIST CATTLE INSURANCE COMPANY.

DIXON'S CASE.

L. J. G.
1869
Nov. 3, 5.

9 Eq 116
7 Ch 58

Forfeiture of Shares—Collusive Forfeiture—Ultrà Vires Act—Power of Directors to compromise Disputes—Lapse of Time.

D. agreed, in the year 1846, at the instance of the local manager, to become a director of an unlimited company, on the understanding that he should incur no responsibility as a shareholder until an Act of Parliamênt had been obtained limiting the responsibility of the shareholders. Ten shares were accordingly allotted to *D.*, and he was entered on the list of shareholders, and subsequently signed a document appointing a proxy to vote for him at a meeting of shareholders, and he also received a dividend on the ten shares. In 1848 an Act of Parliament was applied for, but was not obtained. In the same year *D.* wrote to the local manager, through whom he had obtained the shares, reminding him of the circumstances, and repudiating his liability for calls. In 1849 the directors, at the request of the local manager, who represented to them that the credit of the company might suffer, cancelled *D.'s* shares on payment of all past calls. The directors had power to compromise disputed claims against the company, but had no power to cancel shares, except by forfeiture for non-payment of calls. The company was wound up in 1861:—

Held (reversing the decision of the Master of the Rolls), that as there was no dispute between the company and *D.* as to the fact of his being a member of the company, the cancellation of his shares by the directors was *ultrà vires*, and that the lapse of time was no bar to the claim against him. His name was, therefore, placed on the list of contributories.

Lord Belhaven's Case (1) distinguished.

Spackman v. *Evans* (2) followed.

Affirmed LR 5 HL 606

THIS was an appeal from a decision of the Master of the Rolls made in the winding up of the *Agriculturist Cattle Insurance Company*.

The company was formed in the year 1845, as an unlimited company, it being then intended to obtain an Act of Parliament to limit the liability of the members.

In the year 1846, Mr. *T. G. Dixon*, the Appellant in the present case, was applied to by Mr. *D. Wilkie*, the manager of the company for *Scotland*, to become a member of a board of directors for *Scotland*, and he assented to do so on the assurance of Mr. *Wilkie*, that until an Act was obtained limiting the responsibility of the share-

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(1) 3 D. J. & S. 41 11 Jur NS 373. (2) Law Rep. 3 H. L. 171.

L. J. G.
1869
Dixon's Case.

holders, he should not be required to sign the deed of settlement, or be responsible as a shareholder.

Ten shares in the company were accordingly allotted to *Dixon* as the qualification for the directorship; and on the occasion of a meeting which was called for the 13th of May, 1846, he signed a proxy in the following terms:—

"I, *Thomas Griffies Dixon*, a shareholder in the *Agriculturist Cattle Insurance Company*, do hereby authorize *William Fenton*, Esq., of *London*, a shareholder also in the said company, to be my proxy at a meeting of the shareholders thereof convened for the 13th of May next, and there, or at any adjournment thereof, and at any ballot thereby respectively appointed to be taken, to act and vote for me and in my name, on behalf, in, or upon any matter or thing proposed relative to the concerns of the said company, unless I myself shall be then and there present to vote therein."

Mr. *Dixon* received a notice, dated the 20th of January, 1847, of a dividend at the rate of £3 per cent. for the half-year ending the 31st of December, 1846, and he gave a receipt for the amount dated the 24th of February, 1847.

In the year 1848 the directors applied for an Act of Parliament, but did not succeed in obtaining one.

In February, 1848, an application was made to *Dixon* for a call of £1 per share; and in June the *London* manager wrote to him, threatening proceedings in case he refused to pay it. *Dixon* took no notice of those communications.

In August, 1848, a second call of £1 per share was made; and on the 14th of September *Dixon* received a circular, calling upon him to pay what was due from him. In answer to this he wrote a letter to Mr. *Wilkie*, on the 16th of September, in which he said: "As I have received a circular connected with the *Agriculturist Cattle Insurance Company*, I think it proper to remind you of the position in which I am regarding that company. You will recollect, that at the time you put down my name and paid a deposit, you distinctly stated to me that you wanted my name for the purpose of appearing in a list of extraordinary directors in *Scotland*, when such should be advertised, and when an Act of incorporation was got limiting the responsibility of the shareholders; and that

L. J. G.
1869
Dixon's Case.

until that was got you would not ask me to sign any contract or consider me responsible as an ordinary shareholder. I have never considered myself properly entitled to interfere with the affairs of the company. I will be obliged if you will explain these circumstances to the board, if you have not done so already, and set the matter at rest. I may remind you that you put down my name and paid the deposit yourself, and you have never asked me to repay you the amount, whatever it is. I wish well to the company, and have uniformly insured my stock with it, but I do not think that, under the circumstances I can be fairly held a responsible shareholder."

In the months of October and November general meetings were held, which resulted in what was called "The *Chippenham* Compromise," at which those shareholders who desired to retire were permitted to do so on certain terms. *Dixon* did not attend these meetings, as he did not consider himself liable as a shareholder, and consequently he was not included in the compromise.

On the 2nd of March, 1849, Mr. *Wilkie* wrote to the secretary of the company, explaining the circumstances under which *Dixon's* name had been put upon the list of shareholders, and proposed that his name should be removed from the list on payment of the calls which had been already made.

To this letter the secretary of the company returned an answer, dated the 5th of March, 1849, in which he said: "No Act of Parliament will limit the responsibility of shareholders; and a special Act is now being prepared by Government to effect this most important alteration in the law; but I do not see that Mr. *Dixon* can expect to get off on such a plea."

To this letter Mr. *Wilkie* replied, in a letter of the 7th of March, 1849, as follows: "I notice what you say in answer to my letter regarding that gentleman's position. In law he may probably be considered bound, but it is thought that it would be considered equitable that he be released. Would the directors not agree to cancel his name upon payment of the calls that have been made, according to the number of shares for which he is entered? If the directors will be willing to do this, I shall advise him to agree to do so. I really wish this were agreed to, for, from my having pledged my word, as I explained in my last letter, it would go far to make gentlemen lose all confidence in me as acting for the company, and this under our present circumstances would have a very bad effect."

On the 9th of March the secretary wrote to Mr. *Wilkie* as follows:—

"I think the directors will accept payment of calls and allow these shares to be cancelled. Under the circumstances it would, I think, be advisable."

The directors accordingly on the 17th of April, 1849, passed a resolution that the shares should be cancelled, the past calls having been paid by Mr. *Wilkie.*

This resolution was not submitted to any meeting of shareholders, but in the balance-sheet presented to the annual general meeting on the 23rd of November, 1849, was included a sum received on account of "shares cancelled," one of the items being £40 received from Mr. *Dixon* in respect of ten shares. This report was presented in the usual way and adopted by the meeting.

The company was ordered to be wound up on the 28th of March, 1861.

By the 125th clause of the deed of settlement the directors had power to declare shares forfeited for the non-payment of instalments or subscriptions.

By the 164th, power was given them to enter into any compromise with respect to any claims made against or owing to the company.

By the 198th they were empowered to bring actions, suits, and take other proceedings against shareholders, and to compromise any such actions, suits, or proceedings.

The two last-mentioned clauses are given at length in the report of *Lord Belhaven's Case* (1).

The affairs of the company have been on numerous occasions brought before the Courts of equity and the House of Lords in the case of persons who have sought to have their names removed from the list of contributories. The principal of these cases are subsequently referred to. The Master of the Rolls held that the present case was most similar to *Lord Belhaven's Case,* and ordered that Mr. *Dixon's* name should be struck off the list of contributories; and from this decision the official manager appealed.

(1) 3 D. J. & S. 41. 11 Jur NS 572

Mr. *Southgate*, Q.C., and Mr. *Bush*, for the Appellant:—

The order of the Master of the Rolls is in distinct opposition to the decision of the House of Lords in *Spackman* v. *Evans* (1). In *Lord Belhaven's Case* (2) there was a dispute between the company and Lord *Belhaven* whether he was a shareholder, and the Court held that the directors had power to compromise that dispute. But in the present case there was no dispute on that point. It was beyond question that *Dixon* was a shareholder, and there was nothing for the directors to compromise. What they did amounted to a simple cancellation of his shares; and as the case did not come under the terms of the "*Chippenham* compromise," the cancellation was *ultrà vires.* The previous cases in the House of Lords with respect to this company have decided that the lapse of time is no bar to the claim against *Dixon.*

[They also referred to *Brotherhood's Case* (3); *Spackman* v. *Evans; Stanhope's Case* (4); *Stewart's Case* (5); *Evans* v. *Smallcombe* (6); *Houldsworth* v. *Evans* (7); *Ex parte Morgan* (8).]

Sir *R. Baggallay*, Q.C., and Mr. *G. N. Colt*, for Mr. *Dixon*:—

There is no real distinction between this case and *Lord Belhaven's Case.* It may be that there was no question that he was originally a shareholder; but he claimed to be released from his liabilities on the ground that he was induced to become a shareholder by misrepresentation. There can be no doubt that if the directors had refused to cancel his shares he might have obtained relief from this Court. There was, therefore, a *bonâ fide* controversy between him and the company, which the directors had power to compromise under the provisions of their deed: *Fox's Case* (9); *Tatam* v. *Williams* (10). After a delay of twelve years which elapsed between this transaction and the winding up of the company the Court will conclude that the company had sanctioned the cancellation of the shares: *Prendergast* v. *Turton* (11); *Clegg* v. *Edmondson* (12).

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(1) Law Rep. 3 H. L. 171.
(2) 3 D. J. & S. 41. 11 Jur. N.S. 572.
(3) 31 Beav. 365. 8 Jur. N.S. 905
(4) Law Rep. 1 Ch. 161. 12 Jur. N.S. 79
(5) Ibid. 511. 12 Jur. N.S. 403. 611
(6) Ibid. 3 H. L. 249.
(7) Law Rep. 3 H. L. 263.
(8) 1 Mac. & G. 225.
(9) Law Rep. 5 Eq. 118.
(10) 3 Hare, 347.
(11) 1 Y. & C. Ch. 98.
(12) 8 D. M. & G. 787. 3 Jur. N.S. 299

L. J. G.
1869
Dixon's Case.

5 H.L. 608

Sir G. M. Giffard, L.J.:—

I sincerely wish that I could follow the very able judgments of Lord *St. Leonards* and Lord *Romilly* in the House of Lords, in *Spackman* v. *Evans* (1), but unfortunately I cannot do so, for able as those judgments were, they failed to prevail with the majority of their Lordships; and I must take the law to be this, namely, that in this particular company there is no power simply to cancel shares, no power simply to discharge a shareholder. If this transaction is simply a cancellation of shares, or the discharge of a shareholder, the mere lapse of time must be considered, standing by itself, as quite immaterial, and as forming no ground for taking this gentleman's name from the list of contributories. That being so, we are brought to the consideration of *Lord Belhaven's Case* (2). That case proceeded entirely upon the ground that there was a controversy between the alleged shareholder and the company, and a compromise of that controversy. What I have now to consider is, whether the facts of this case come up to *Lord Belhaven's Case:* in other words, whether there really was, looking at all this correspondence, and at what took place, a controversy between Mr. *Dixon* on the one hand, and the company on the other, as to whether Mr. *Dixon* was, or was not, a shareholder. In examining that I must certainly take Mr. *Dixon* to be bound by Mr. *Wilkie's* letters, and Mr. *Wilkie's* communications with the company. Bearing that in mind, we must begin with this fact, that the cancellation took place in March, 1849; and, as I said before, I regret that I cannot pay any attention to the lapse of time, as the decision of the House of Lords has precluded me from doing so. The transaction itself, by which Mr. *Dixon* became connected with the company, took place early in the year 1846, and was entirely between Mr. *Dixon* and Mr. *Wilkie,* as detailed in the first paragraph of Mr. *Dixon's* affidavit, the accuracy of which I see no ground for disputing:—[His Lordship then referred to the facts as stated above, and read the letters of the 16th of September, 1848, and of the 2nd, 5th, and 7th March, 1849, and continued:—] It is impossible to say upon these letters that there was a controversy between the company and Mr. *Dixon* and Mr. *Wilkie* as to whether Mr. *Dixon* was or was not a shareholder. There was a distinct admission by Mr. *Dixon* himself that he was a shareholder, and there was a further admission by Mr. *Wilkie* that he was a shareholder, which was sent to the company; and the only ground suggested for releasing Mr. *Dixon* is, that confidence would be lost in Mr. *Wilkie*, and, consequently, that the company would be damaged; but as to there being any compromise of any disputed question, certainly there is nothing of the sort. Then follows the letter of the 9th of March, 1849, which must proceed, if it proceeds upon anything at all, upon the erroneous supposition of these parties that they had the power to cancel the shares. Then the money is paid by Mr. *Wilkie*, and there are resolutions passed which are in terms to cancel and forfeit. Under those circumstances I have no hesitation in saying that I cannot distinguish this case from *Spackman's Case* (1), and *Stanhope's Case* (2), and I cannot see any grounds upon which it can be brought within *Lord Belhaven's Case* (3). There was no question in controversy between Mr. *Dixon* and the company. There was no suggestion as to his not being a shareholder, and there was really nothing to compromise. It was a mere attempt to cancel shares and to discharge the shareholder by agreement, as distinct from compromise. Unfortunately for Mr. *Dixon*, these directors had no power to do anything of that description.

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(1) Law Rep. 3 H. L. 171.

(2) 3 D. J. & S. 41. 11 Jur
572

Upon those grounds, therefore, Mr. *Dixon's* name must be upon the list, but under the circumstances I cannot make Mr. *Dixon* pay any costs.

Solicitors for the Official Liquidator: Messrs. *Horn & Murray*.
Solicitors for Mr. *Dixon*: Messrs. *Kingsford & Dorman*.

(1) Law Rep. 3 H. L. 171. 14 Jur. N. S. 572 (2) Law Rep. 1 Ch. 161. 12 Jur. N. S. 79
(3) 3 D. J. & S. 41. 11 Jur. N. S. 72

L. J. G.
1869
Nov. 12.

In re JOINT STOCK DISCOUNT COMPANY.

WARRANT FINANCE COMPANY'S CASE.

Proof in Winding-up—Debts carrying Interest—Proof against two Estates.

Post 91-2
10 Ch 12-3,
17 Ch D. 334. 5-6
4 App Cas 382

The rule that a creditor of a company which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding-up, does not prevent a creditor who has a right of proof for the same debt against the estates of two companies in liquidation from receiving dividends from both estates until the full amount of his debt and interest has been satisfied.

The decision of the Master of the Rolls reversed.

THIS was an appeal from an order of the Master of the Rolls, made in the winding up of the *Joint Stock Discount Company, Limited.*

The *Warrant Finance Company* were the holders of unpaid bills of exchange to the amount of £13,000, which were drawn upon and accepted by the *Contract Corporation* and were indorsed by the *Joint Stock Discount Company.* The *Contract Corporation* and the *Joint Stock Discount Company* being both in process of liquidation, the *Warrant Finance Company* proved for the amount due on the bills against both estates. They had already received dividends to the amount of 15*s.* 6*d.* in the pound from the estate of the *Joint Stock Discount Company,* and dividends to the amount of 4*s.* 6*d.* in the pound from the estate of the *Contract Corporation,* making together 20*s.* in the pound. But they claimed to continue to prove against the *Joint Stock Discount Company* to the full amount of £13,000 until the interest which had accrued since the commencement of the winding-up was also satisfied. The bills did not become due till after the commencement of the winding-up; and consequently no interest had accrued before that time. The Master of the Rolls was of opinion that the case was governed by the *Warrant Finance Company's Case* (1), and made an order excluding the *Warrant Finance Company* from participating in any further dividends paid to the creditors of the *Joint Stock Discount Company* until all the other creditors had been paid in full. From this decision the *Warrant Finance Company* appealed.

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(1) Law Rep. 4 Ch. 643.

Sir *R. Baggallay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *A. G. Langley*, for the Appellant:—

The case is not governed by the *Warrant Finance Company's Case* (1) for that was a simple case of proof against the estate of the company. But in the present case the creditor has a right of double proof; and the rule must be the same as in bankruptcy, where, in a similar case, the creditor would be allowed his full proof against both estates (2). The principle is the same as that of a secured creditor, as in *Kellock's Case* (3).

Mr. *Jessel*, Q.C. (Mr. *Locock Webb* with him), for the official liquidator:—

The *Warrant Finance Company's Case* is in point, and this order cannot be reversed without overruling that case. The dividends paid to the Appellants were appropriated to the payment of the principal, and could not be applied by them to the payment of interest.

SIR G. M. GIFFARD, L.J.:—

I am clearly of opinion that this case is not governed by the *Warrant Finance Company's Case*, and that the order of the

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(1) Law Rep. 4 Ch. 643.

(2) The Appellants gave in evidence the certificate of Mr. *Graham*, the senior official assignee of the Court of Bankruptcy in *London*, as to the practice of that Court, which was to the following effect:—

"I have never known an instance of an application in bankruptcy to expunge a proof upon a bill of exchange on the ground that the creditor had been fully paid his full claim upon the bill for principal and for all interest, whether accrued before or after the bankruptcy.

"The practice in bankruptcy is when the estate of a bankrupt acceptor has paid to the holder 4*s*. 6*d*. in the pound, and the estate of the bankrupt drawer has paid to the holder 15*s*. 6*d*. in the pound, the holder retains his proof on the two estates until the first of them pays the full amount that his interest on the said bill amounts to.

"Supposing that the drawer's estate is the first to pay the full amount, the holder remains trustee of all future dividends for the assignees of the drawer, but what is generally done is to hand the said bill over to the drawer's assignees with orders from the holder directed to the official assignee of the acceptor's estate, authorizing him to pay all the future dividends to the official assignees of the drawer. Thus it remains, unless some creditor of the acceptor's estate shews to the Commissioner ground for concluding that the drawer's estate has no claim upon the acceptor's.

(3) Law Rep. 3 Ch. 769.

L. J. G.
1869
WARRANT FINANCE COMPANY'S CASE.

17 Ch D. 771

Master of the Rolls must therefore be discharged. It certainly is in principle, though not in form, the same as *Kellock's Case* (1). The right of proof against the other estate is the same as having a separate security, and the rule in bankruptcy, as appears from the certificate of the official assignee, and which is well understood to be the practice, is quite clear and definite. The only ground on which the argument to the contrary could be put is that taken by Mr. *Jessel*, namely, that there has been an appropriation of the dividends to the payment of principal. But that is a mistake. The rule which has been made has no such effect. It is a rule adopted because it is found a just and convenient rule for the administration and realization of assets under the particular bankruptcy or the particular winding-up; but it is not meant at all to interfere with the rights of the creditor, if he can get payment from other sources, to combine and retain all that he can obtain from all those sources until he is paid not only his principal but all his interest, and so the debt is entirely satisfied. The order will be discharged, and the costs of both parties below and here will come out of the estate.

Solicitors for the *Warrant Finance Company*: Messrs. *Flux, Argles, & Rawlins.*

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

L. J. G.
1869
Nov. 19.

In re HUMBER IRONWORKS AND SHIP-BUILDING COMPANY.

WARRANT FINANCE COMPANY'S CASE. (No. 2.)

Proof in Winding-up—Debts carrying Interest—Secured Creditor—Practice—Appeal from Order in Chambers.

19 Eq. 458,
6 Ch D. 347
WN (1877) C C

The rule that a creditor of a company which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding-up does not prevent a creditor who holds a security from receiving dividends to the full amount of the principal, and at the same time realizing his security until the full amount of principal and interest has been satisfied.

In such a case it makes no difference that the security is on part of the

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(1) Law Rep. 3 Ch. 769.

L. J. G.
1869

WARRANT FINANCE COMPANY'S CASE. (No. 2.)

estate of the company, or that it is vested in trustees on behalf of the creditors and the company.

The decision of the Master of the Rolls reversed.

No appeal will be allowed from an order made in Chambers unless the Judge certifies that the case has been so fully argued before him in Chambers that he does not require it to be re-argued in Court.

THIS was an appeal from an order of the Master of the Rolls made in the winding-up of the *Humber Ironworks and Ship-building Company, Limited,* directing the *Warrant Finance Company* to refund a sum of £1195 8*s.* 10*d.*, part of the dividends which had been paid to them under the following circumstances:—

The *Warrant Finance Company* accepted bills drawn by the *Humber Ironworks Company* at three months, to the amount of £25,000, which became due on the 22nd of March, 1866, a few days after the order was made for winding up the company. The payment of the bills on maturity was secured by promissory notes and debentures of the *Humber Ironworks,* and by an assignment of the arrears of calls, as explained in the following memorandum:—

By a memorandum of agreement, dated the 22nd of December, 1865, between the *Humber Ironworks Company* of the first part, the *Warrant Finance Company* of the second part, *J. A. Mann* of the third part, and *William K. Henderson* of the fourth part, reciting that the *Humber Ironworks Company* had applied to the *Warrant Finance Company* to lend them £25,000 by acceptances of the said *Warrant Finance Company* to the drafts of the *Humber Ironworks Company,* and that the *Warrant Finance Company* had accordingly given acceptances for £25,000 at three months' date, and also that the *Humber Ironworks Company* had given a debenture bond in the name of *J. A. Mann,* as trustee for the *Warrant Finance Company,* for the sum of £25,000, payable on the 22nd of March, 1866, and had also given to the *Warrant Finance Company* promissory notes for £25,000 due on the 22nd of March, 1866, and had executed an assignment to *J. A. Mann* and *W. K. Henderson,* as trustees for the *Warrant Finance Company,* of all arrears of calls due on the present share capital of the said *Humber Ironworks Company;* it was agreed that the *Humber Ironworks Company* should transfer or pay to the credit of the said *J. A. Mann* and *W. K. Henderson* with the bankers of the said *Humber*

L. J. G
1869
Warrant Finance Company's Case. (No. 2.)

Ironworks Company all moneys already received or to be received on account of the said arrears of calls, and that *J. A. Mann* and *W. K. Henderson*, and the survivor of them, should stand possessed of the said moneys in case default should be made in payment by the said *Humber Ironworks Company* to the said *Warrant Finance Company* on the 22nd of March, 1866, of the said sum of £25,000, or any part thereof, to pay the moneys so standing to their credit in the said bank to the said *Warrant Finance Company* in or towards satisfaction of the moneys so remaining unpaid, and in case any surplus remained after satisfaction of the last-mentioned moneys, then to pay such surplus to the said *Humber Ironworks Company.* But in case the said *Humber Ironworks Company* should duly pay the said sum of £25,000 on the 22nd of March, 1866, then the trustees or trustee should pay over the whole of the said moneys so standing in their or his names or name to the said *Humber Ironworks Company.* And it was declared that in case default should be made in payment of the £25,000, the *Warrant Finance Company* should have power to deal with the promissory notes and debenture as they might think fit, and out of the proceeds thereof to repay themselves the said sum of £25,000, and all costs and charges incurred by them and by the said trustees in relation to the security. And it was lastly agreed and declared that in case default should be made in payment of the sum of £25,000, or any part thereof, on the 22nd of March, 1866, the said *Humber Ironworks Company* should pay interest at the rate of £20 per cent. per annum to the said *Warrant Finance Company* upon the said sum of £25,000, or so much thereof as should remain unpaid after the said 22nd of March, 1866.

The debenture was dated the 21st of December, 1865, and thereby the company became bound to pay to *J. A. Mann* the sum of £25,000 on the 22nd of March, 1866, and the company charged the same sum on the capital, property, and effects of the company.

The assignment was dated on the same day, and thereby the company assigned to *Mann* and *Henderson* all the present arrears of calls due on the shares then constituting the capital of the said company.

The order to wind up the *Humber Ironworks Company* was made on the 16th of March, 1866.

The *Warrant Finance Company* had received altogether, in respect of the arrears of calls, £11,104 10*s.* 1*d.*, and had also received dividends under the winding-up amounting to £15,090 18*s.* 9*d.*, so that they had received £1195 8*s.* 10*d.* more than the principal of their debt. This they claimed to retain towards the interest at 20 per cent. which was due to them under their agreement. The Master of the Rolls, however, considering that the case was governed by the authority of the *Warrant Finance Company's Case* (1), ordered them to refund the amount paid in excess of the principal. From this order the *Warrant Finance Company* appealed.

Nov. 12, 1869. Sir *R. Baggallay*, Q.C., applied to the Court for permission to bring on the appeal. He stated that the order had been made by the Master of the Rolls in Chambers, and the case had not been argued by counsel in open Court.

The LORD JUSTICE GIFFARD gave leave to bring on the appeal, but said that in future no appeal would be heard from an order made in Chambers unless the Judge certified that the case had been so fully argued before him in Chambers that he did not require it to be re-argued in Court.

Nov. 19, 1869. Sir *R. Baggallay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *A. G. Langley*, for the Appellants:—

The principle laid down in the *Warrant Finance Company's Case* applies only to the case of ordinary debts, not to the case where the creditor has a security. In that case the creditor has a right to enforce all his remedies at once: *Kellock's Case* (2); *In re Xeres Wine Company* (3); *Bower* v. *Marris* (4). The present case is similar in principle to *In re Joint Stock Discount Company* (5). In that case the creditor had a right of proof against the estate of a surety; here he has a security given by the principal debtor.

The Appellants are in the position of mortgagees, who cannot be compelled to give up their security until they are paid the whole

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(1) Law Rep. 4 Ch. 643.
(2) Ibid. 3 Ch. 769.
(3) Law Rep. 3 Ch. 769.
(4) Cr. & P. 351.
(5) *Ante*, p. 86.

L. J. G.
1869

WARRANT FINANCE COMPANY'S CASE. (No. 2.)

of their principal and interest, even though interest is not specially mentioned in the deed: *Ashwell* v. *Staunton* (1).

Mr. *Southgate*, Q.C., and Mr. *Wickens*, for the official liquidator:—

This is not like the case of a mortgagee, who may retain possession of his security till he is fully paid: the transaction was an interchange of acceptances, and the arrears of calls were assigned to trustees for both parties. We must, therefore, look at the construction of the agreement; and it is clear that the assignment was intended to be a security for the principal only, and not for the interest. The payments made to the Appellants have been appropriated to reduction of the principal: at all events they have never been treated by them as paid on account of interest.

SIR G. M. GIFFARD, L.J.:—

I quite agree with the Master of the Rolls in this case as to the construction he has put upon the agreement, namely, that it is really an assignment of the principal sum to two trustees, upon trust to pay a certain principal sum of money and interest, and, therefore, that those rules which apply to the case of a person coming into Court to redeem a mortgage have no application. But I do not think that is conclusive on this question: on the contrary, I think the question is concluded by the case of *In re Joint Stock Discount Company* (2), which I decided a few days ago in accordance with the well-known rule in bankruptcy which has been acted on for so many years. I take that rule to be very simple. The creditor proves in the winding-up as in bankruptcy, for whatever the amount of the principal and interest up to a particular date may be; but that is for the purpose of convenience in the administration of the winding-up, and does not and is not intended to affect any other rights which the creditor may have, and does not amount to an appropriation in any shape or form. The result is, that as in many cases the creditor has a claim on two or more estates, he proves against each of those estates for whatever is due up to the date of the bankruptcy or winding-up, so that he may get from each of those estates everything he can until the debt is extinguished

(1) 30 Beav. 52.

(2) *Ante*, p. 86.

in the proper sense of the term. That is the rule which has been adopted in bankruptcy, and has been acted upon for a series of years, and must be taken now to be the law. This case appears to me to stand exactly as it would have done in bankruptcy, provided there had been proof against the joint estate and the security had been on the separate estate. In winding up it makes no difference that the security is on the estate against which the proof is made. Although the proof in terms is in respect of principal, that does not amount to any appropriation, or preclude the party who has proved from appropriating the sum received for the payment of interest so long as interest is due.

This order, therefore, must be discharged. The official liquidator must have his costs of the appeal out of the estate.

Solicitors for the Appellants: Messrs. *Flux, Argles, & Rawlins.*

Solicitors for the Official Liquidator: Messrs. *Davidson, Carr, & Bannister.*

In re HOLLYFORD COPPER MINING COMPANY.

L. J. G.
1869
Dec. 11.

3 Ch. D. 59
14 Q.D. 628

Companies Act, 1862, s. 122—*Winding-up—Irish Order.*

An order for a call was made by the Court of Bankruptcy in *Ireland* in a winding-up remitted to it by the Court of Chancery in *Ireland*:—

Held, that for the purpose of enforcing the call against contributories resident in *England*, the order must be made an order of the Court of Chancery in *England*, and that there was no jurisdiction to make it an order of the Court of Bankruptcy in *England*.

THIS was a motion by way of appeal from a decision of Mr. Commissioner *Bacon*.

The *Hollyford Copper Mining Company, Limited*, was a company having its registered office in *Ireland*. In 1867 an order for winding it up was made by the Court of Chancery in *Ireland*, and the proceedings were transferred to the Court of Bankruptcy in *Ireland* under the *Companies Act*, 1862, s. 81.

On the 13th of July, 1869, an order was made by the Court of Bankruptcy in *Ireland* that a call of 4*s.* 6*d.* per share should be made on all the contributories of the company named in the schedule

L. J. G.
1869
In re HOLLYFORD COPPER MINING CO.

thereto, and that the several contributories named in the schedule thereto who were therein stated to be resident in *England* should each of them, within ten days after service on them by post of a copy of the order, pay to *L. H. Deering*, one of the official liquidators, the sums set opposite to their respective names in the schedule. Then, after directions as to payment by contributories in *Ireland*, the order proceeded to direct that it should be served by transmitting a copy in a registered letter to each contributory. This was done, but a number of the contributories who were resident in *England* failed to pay the call within the time limited by the order. The official liquidators thereupon applied to the Court of Bankruptcy in *England* that the order for a call might be made an order of the Court of Bankruptcy in *England* for the purpose of enforcing it against the contributories resident in *England*. Mr. Commissioner *Bacon* declined to make any order, being of opinion that he had no jurisdiction to do so. The application was now renewed before Lord Justice *Giffard*.

Mr. *Lindley*, for the appeal motion, referred to the *Companies Act*, 1862, ss. 81, 122, 123, and the *Bankruptcy Act*, 1861, s. 219.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that the learned Commissioner was right, and that there is no jurisdiction to make this order an order of the Court of Bankruptcy. Suppose the company had been registered here, the Court of Bankruptcy would not have any jurisdiction as to winding it up unless the Court of Chancery remitted the winding-up proceedings to the Court of Bankruptcy, which in this case the Court of Chancery in *England* has not done and could not do. The Court of Bankruptcy in *England* is, therefore, not the Court to be applied to. I think, however, that there is no difficulty as to the course to be taken under the 122nd section. The Court of Chancery in *Ireland* remitted the winding-up to the Court of Bankruptcy there, which, therefore, had jurisdiction to make the order for a call. When that order is brought over it must be made an order of that Court which would have had jurisdiction to wind up the company if it had been registered here—that is, of the Court of Chancery. I therefore make the order sitting in Chancery. The form will be adopted which was used in a case to which Mr. *Rogers* has referred me, the *Liverpool and Dublin Steam Navigation Company, Limited*, before *Wood*, V.C., Dec. 4, 1866, where an order of the Court of Chancery of the County Palatine of *Lancaster* was made an order of this Court. /1/

The order, after fully reciting the order of the Court of Bankruptcy in *Ireland*, proceeded to direct "that the said order of the said Court of Bankruptcy and Insolvency, dated the 13th day of July, 1869, be made an order of this Court as against such of the persons named in the first part of the schedule hereto as are named in the 2nd column of part 2 of the said schedule hereto."

[Part 1. was a copy of the schedule to the Irish order; and the 2nd column of part 2 contained the names and addresses of the contributories resident in *England*.]

Solicitors: Messrs. *W. Tatham & Son.*

(1) See Reg Lib 1866 B fo 2461.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.
Ex parte KINTREA.

L. J. G.
1869
Nov. 25.

Companies Act, 1862, s. 35—*Winding-up—Rectification of Register—Transfer to avoid Liability—False Recitals—Practice—Costs—Form of Summons to rectify Register.*

K., a shareholder in a company which was in difficulties, but whose shares had still a market price, transferred them to *L.* by a deed, in consideration of a sum expressed to be paid by *L.*, being about the market price. No sum was, in fact, paid, nor had there been any contract of sale, *K.* having brought the transfer to *L.*, and asked him to execute it, saying it was a transfer of shares to him, but saying nothing more. *L.* was a ship's steward, whose wages were £1 a week. The transfer was duly registered, the directors, who had a power of declining to receive any transfer, not objecting, and *L.* was entered on the register. A few weeks afterwards an order was made to wind up the company. The official liquidator having applied to rectify the register by restoring the name of *K.*:—

Held (affirming the decision of *Stuart*, V.C.), that the Court had jurisdiction to set the matter right under the *Companies Act*, 1862, s. 35, for that the name of any person improperly entered or omitted must be considered to be entered or omitted "without sufficient cause:"

Held, also, that as this was part of the proceedings in the winding-up, the

9 Eq 226
5 Ch 564,
6 Ch 290, –
6 Ex 133.
WN (71) 185
13 Eq 74
7 Ch 299
4 App Cas
656.
15 Ch D 1

23 Ch D. 428

L. J. G.
1869
In re
BANK OF
HINDUSTAN,
CHINA,
AND JAPAN.
Ex parte
KINTREA.

Court had jurisdiction to order *K.* to pay costs. Whether in the case of a going concern costs could have been given against *K.*, *quære:*

Held, also, that the application ought to have been in the name, not of the liquidator, but of the company, and that the summons must be amended accordingly.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Stuart*, rectifying the register of shareholders of the *Bank of Hindustan, China, and Japan*, by restoring the name of the Appellant *A. Kintrea*, as member in respect of 145 shares transferred to *A. M'Lachlan* in June, 1866, and ordering *Kintrea* to pay the costs.

In May, 1866, the company, which was one formed under the *Joint Stock Banking Companies Act*, 1856, was in difficulties, and the £100 shares, on which £25 had been paid, were selling at £3 10*s*. In that month a meeting was held at which its affairs were discussed. In June, 1866, *Kintrea* transferred the 145 shares in question to *M'Lachlan*, who was described as of 30, *Lower Lion Street, Southampton*, without any reference to his station in life, by a deed in the usual form, expressed to be made in consideration of £195 paid by *M'Lachlan* to *Kintrea*. No money was, in fact, paid. *M'Lachlan* was a cousin of Mrs. *Kintrea*, and was the steward of a ship receiving £1 a week, and had no other means. It appeared from the evidence that there was no bargain between *Kintrea* and *M'Lachlan*, and that all that passed was that *Kintrea* asked *M'Lachlan* to sign the deed as a transfer of shares to him. The directors had power under the articles to refuse to register any transfer. The transfer in question, however, was registered in the ordinary course. It appeared that at subsequent meetings of the company *Kintrea*, who was also the owner of other shares remaining in his name, spoke of himself as owner of the shares transferred as above mentioned. On the 15th of November, 1866, a winding-up Petition was presented, and on the 21st of December an order was made upon it. Until shortly before that time the shares had a market price, and sales of them to solvent persons could be effected.

On the 29th of June, 1869, Vice-Chancellor *Stuart*, on summons by the official liquidator, after personally hearing the solicitors of the parties, made in Chambers the order under appeal, rectifying the register in the manner above mentioned.

On the 2nd of August, 1869, a motion to discharge this order

L. J. G.
1869
In re Bank of Hindustan, China, and Japan. *Ex parte* Kintrea.

came on before Lord Justice *Giffard,* who declined to hear it until the Vice-Chancellor had either heard the case argued by counsel or refused to do so.

On the 11th of November, 1869, the Appellant applied to Vice-Chancellor *Stuart* to have the case heard in Court, or to make in Court *pro formâ* the same order which had been made in Chambers. The Vice-Chancellor declined to do either, and refused to make any order. The appeal motion was now brought on again.

Mr. *Hardy,* Q.C., and Mr. *Higgins,* for the Appellant:—

We say that this was a transfer to *M'Lachlan* as trustee, and not made to avoid liability, but for better dealing with the shares in the market. That *M'Lachlan* was not a responsible person is immaterial, for it was the duty of the directors to take an objection to the transferee, if there was any, before the transfer was registered. In the Act of 1862 member and contributory are identical: *In re Anglesea Colliery Company* (1); *Companies Act,* 1862, ss. 7, 23, 38, 74. The cases similar to the present in which a transferor has been placed on the list of contributories was under the Acts before that of 1856. We submit that, under sect. 35, the register cannot be altered in such a case as this. There are only three classes of cases in which it may be done: 1, where a name is entered without sufficient cause; or 2, omitted without sufficient cause; or 3, where there has been default or delay on the part of the company. There is no case here of omission without sufficient cause: *Re British Sugar Refining Company* (2). In *Ward and Henry's Case* (3) Lord *Cairns* considered that there was no power to amend unless there had been default of the company. The official liquidator who represents the company therefore cannot come under it: *Sichell's Case* (4); *Ex parte Ward* (5); *In re Bahia and San Francisco Railway Company* (6). Where there has been an opportunity for inquiry it is the duty of the directors to make inquiry: *Weston's Case* (7); *Lumsden's Case* (8). To escape liability a transferor is only bound to shew a transferee liable at law: *Curtis's Case* (1); and that is done here. As to costs, the 35th section, which creates this jurisdiction, gives no power to award costs except against the applicant or the company.

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(1) Law Rep. 1 Ch. 555. 12 Jur NS 696
(2) 3 K. & J. 408.
(3) Law Rep. 2 Ch. 431.
(4) Ibid. 3 Ch. 119.
(5) Law Rep. 3 Ex. 180.
(6) Ibid. 3 Q. B. 584.
(7) Ibid. 4 Ch. 20.
(8) Ibid. 31.

The LORD JUSTICE GIFFARD desired counsel for the official liquidator, to confine themselves to the question whether the Vice-Chancellor had jurisdiction to make the Appellant pay costs.

Mr. *Greene*, Q.C., and Mr. *Lindley*, for the official liquidator:—

We contend that the concluding part of sect. 35, gives this jurisdiction, but if not, this is a proceeding under a winding-up, and by the *Companies Act*, 1862, s. 170, and the 74th rule of Gen. Ord., 11th of November, 1862, the general jurisdiction of the Court applies: *Re Woodburn's Will* (2); *Re Birkbeck Life Assurance Company* (3).

Mr. *Hardy*, in reply:—

On this application we are under sect. 35 alone; and the Court cannot give costs unless the terms of the section authorize it. Sect. 98 of the Act, refers back to sect. 35, and so the case is entirely under that section: *Ward and Henry's Case* (4). As to sect. 170, there is no connection between winding-up and the rectification of the register, so that section does not affect the case.

SIR G. M. GIFFARD, L.J.:—

It is to be regretted that this case was not discussed before the Vice-Chancellor, for it is always of the greatest advantage to a Court of appeal to have the benefit of the observations of the Judge whose decision is appealed from, to which I think I may add that it is the right of the suitor not to be obliged to have his case considered by a Court from which there is no appeal except to the House of Lords, without having first had the benefit of a complete discussion in the Court below, and such a statement by the Judge of the grounds of his decision that this Court may have an opportunity of really reviewing it.

I cannot, however, say that I feel any difficulty on any part of

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(1) Law Rep. 6 Eq. 455.
(2) 1 De G. & J. 333. 3 Jur. N.S.
(3) 2 Dr. & Sm. 321. 11 Jur. N.S. 576
(4) Law Rep. 2 Ch. 481.

L. J. G.
1869
In re
BANK OF
HINDUSTAN,
CHINA,
AND JAPAN.
Ex parte
KINTREA.

this case. The greater part of the argument has been directed to the 35th section of the Act of 1862, and the material cases which have been referred to may be readily disposed of. The case of the *Bahia and San Francisco Railway Company* (1) was simply a case in which the Court of Law considered that the company had estopped itself by what it had done. The company there had received certain forged transfers, and had issued a certificate in conformity with them. On the faith of that certificate a third party had dealt, and, as the position of the third party was altered, the Court applied the doctrine of estoppel, which clearly has nothing to do with the present case. The next case was *Ex parte Ward* (2), where an application to rectify the register was made by a member of a company, who said that the company was debarred from carrying on business until the whole of the shares were subscribed for, and that it was carrying on business before this condition had been fulfilled. The Chief Baron *Kelly*, in his judgment, there says that the power conferred by the 35th section is given only under certain circumstances, and that the Plaintiff must shew that his name has been put on the register without sufficient cause, and he proceeds to say: "If he had been induced by fraudulent misstatements or fraudulent suppression to become a member, and thereupon his name had been entered on the register, that entry would have been without sufficient cause." It is clear, then, according to this, that if there is a fraud, or if the transaction is such that it cannot stand, the name is on the register "without sufficient cause." Then we have the two cases in this Court. First, *Ward and Henry's Case* (3), in which the Lord Justice *Turner* and Lord Justice *Cairns* somewhat differed in their view of the 35th section. Lord *Cairns* put a narrower construction upon it than Lord Justice *Turner*, but nothing fell from either of those learned Judges in that case which appears to me to affect in the least degree the present case. There was a complicated state of circumstances, and the Lords Justices held that it was not a proper case for summary interference under the 35th section. That, again, has nothing to do with the present case. The last case to which it is necessary to refer is *Sichell's Case* (4). That

(1) Law Rep. 3 Q. B. 584.
(2) Ibid. 3 Ex. 180.
(3) Law Rep. 2 Ch. 431.
(4) Ibid. 3 Ch. 119.

L. J. G.
1869

In re Bank of Hindustan, China, and Japan. *Ex parte* Kintrea.

was a case in which the company, having lain by and taken no steps for a great length of time, suddenly turned round, being itself in default, and sought to put a person's name on the register. Lord *Cairns* said, in substance: "You, the official liquidator, on the present occasion stand in the shoes of the company, the creditors having no direct equity against a person whose name was never on the register, and the company cannot come here to rectify the register when the state of the register is owing to its own negligence." This decision does not touch the present case.

With regard to the 35th section, whether we consider the latter part of the section as controlled by the former, as was Lord *Cairns*' view, or take the wider view adopted by Lord Justice *Turner*, the result as regards this case is, to my mind, the same, because, *ex concessis*, we have a right to inquire whether *M'Lachlan's* name is on the register without sufficient cause; or, to put it in other words, is it, or is it not, properly on the list of members; because if it is improperly on the list, it is there without sufficient cause.

Now, what are the facts of the present case? There is presented to the directors a transfer which states on the face of it that £195 had been paid by *M'Lachlan*, and thus represents the transaction to be an ordinary transaction of sale and purchase as between *Kintrea* and *M'Lachlan*. When such a representation is made, the directors may well trust to it, and be excused for asking no questions about it. As was said by Lord *Cranworth*, no man who has made a representation to other parties can be heard to say that they ought not to have believed him. I must take it that in this case the directors did believe what was said, and, that being so, I consider that it was not their duty to inquire further. I think that it would be wrong, and very detrimental to a company, if in the case of a *bonâ fide* sale the directors were to say that because the transferee was not rich he should not be put on the register of shareholders. The Appellant cannot complain that his representation was believed, and that by reason of such belief no inquiry was made. But for this representation it would have been the duty of the directors to make inquiry, which duty we must presume that they would have discharged; and what would they have discovered? First, that the £195 never passed at all, and that not a sixpence was paid; next, that *M'Lachlan* was steward

L. J. G.
1869
In re
BANK OF HINDUSTAN, CHINA, AND JAPAN.
Ex parte KINTREA.

on board a steamer, that he had not a halfpenny in the world, and that his wife earned 10*s.* a week. They would also have discovered that it never was the intention of *Kintrea* to part with his interest in these shares, and that he merely wished to put them into the name of *M'Lachlan* for purposes of his own. Mr. *Kintrea* has not come forward to say what those purposes were, and we can only try to come to a reasonable conclusion from the facts of this case as to what they were. Now, considering that although £25 each had been paid on these shares they were worth at that time only about £3 15*s.* each, that they were £100 shares, and that on every one of the 145 there was a liability of £75, the reasonable conclusion is, that the object of the transaction was to put them into the name of a man who was in no degree responsible, so as to take the chance of the market, but to take it in such a way as that all further liability should be escaped.

Then let us go a step further. Supposing the facts had all been known to the directors, would they have assented to the transfer? We must presume that they would not; and if by arrangement with Mr. *Kintrea* they had done so, the transaction would have been what in this Court is looked upon as a fraud upon the company—a colourable transaction which this Court could not allow to stand. That being so, it seems to me to follow as a matter of course that *Kintrea's* name must be restored, and *M'Lachlan's* name taken from the list.

It has been urged in argument that the Court cannot proceed under the 35th section in such cases as *Hyam's Case* (1) and *De Pass's Case* (2), but I have no doubt whatever that this Court can, under the 35th section, deal with such cases as those of *Hyam* and *De Pass* just as it could deal with them under the earlier statutes, for in such a case as *Hyam's Case* the name of the transferee would be on the register improperly, and therefore, as I said before, without sufficient cause.

Then there only remains the question of costs. If we were confined to the 35th section alone I might feel some difficulty; but looking at the 170th section, and remembering that the present application is not to rectify the register of a going company, but is a proceeding under the winding up of a company, I have no doubt

2 QBD 475

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(1) 1 D. F. & J. 75. 6 Jur NS 181

(2) 4 De G. & J. 544. 5 Jur NS 119

L. J. G.
1869
In re
BANK OF HINDUSTAN, CHINA, AND JAPAN.
Ex parte
KINTREA.

that the Court has jurisdiction to order *Kintrea* to pay the costs of the application to have his name restored to the register. I am of opinion, therefore, that the order of the Court below is in substance right, and that this appeal must be dismissed with costs. There is, however, a formal matter which requires correction. The application is made in the name of the liquidator, and the order is drawn up as being made only on his application. In point of form that is wrong. It does not affect the merits in the slightest degree. The objection was not taken in the Court below, therefore no difference ought to be made as to costs, but the summons must be amended by expressing it to be taken out by the company in the place of the liquidator, and the order will be amended by expressing it as made on the application of the company. The Appellant must pay all the costs here and below, except those of amending the summons.

Solicitors: Messrs. *Ashurst, Morris, & Co.;* Messrs. *Lewis, Munns, & Co.*

LEWIS *v.* FOTHERGILL.

L. C.
1869
April 21, 28;
May 5.

1 Ch 751
13 Ch D 2
23 Ch D 59

Agreement—Mining Lease—Working by Instroke—Irremediable Damage—Word "win"—Evidence of Expert.

The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bonâ fide* taken with ordinary dispatch to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal:—

Held, that, under the circumstances, working the coal by instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement:

Held, that as the lessees were actually working the coal, irremediable damage would not be presumed.

Quære, as to the meaning of the word "win."

Semble, that the lessor was not entitled to the dead rent for the first three years.

BY articles of agreement, dated the 27th of April, 1864, and made between *W. W. Lewis*, of the one part, and *T. A. Hankey* and *B. Bateman*, trading under the name of the *Plymouth Iron Company*, of the other part, it was agreed that *W. W. Lewis* should let, and the Company should take, for ninety-nine years, the veins and seams of coal situate under a farm of 250 acres, called *Troed-y-rhiw*, in *Glamorganshire* (with certain exceptions), and all mines, seams, or balls of iron ore under the said farm, at the rent or royalty of 8½*d.* per customary ton of coal worked or gotten; but in case the quantity of coal worked in any year should not amount at the aforesaid rate to the annual rent of £500, then instead thereof the annual rent or sum of £500 should be paid as fixed or dead rent, and a further royalty of 4*d.* a ton was to be paid on every ton of iron ore; the dead rent of £500 not to be charged for the first three years, provided that the necessary steps were *bonâ fide* taken with ordinary dispatch to win and work the said coal, but the royalties were then to be charged only on such coal and minerals as should be worked. The lease when prepared was to contain power to work any other minerals, &c., over or under the said farm from any adjoining estate worked through this estate, on payment of 1*d.* per ton for wayleave. The agreement further specified covenants to be contained in the lease as to keeping accounts, and repairs, and a covenant "for working the said coal and mines in a proper and workmanlike manner." It was also agreed that the lessees might make any roads which might be necessary for conveying the minerals, sink pits, drive headings, and do all other acts and deeds necessary for working the same. Provisions were also made for determining the lease if the minerals were worked out, and for renting surface land if required, and for other matters relating to working the minerals.

The *Plymouth Iron Company* were working certain coal pits, called the *South Duffryn Colliery,* situated to the north of *Troed-y-rhiw,* and had commenced to work the coal under *Troed-y-rhiw* by "instroke" from that colliery, and had run headings from the colliery under *Troed-y-rhiw.*

The *South Duffryn Colliery* was "to the rise" of, or above, the seams of coal under *Troed-y-rhiw,* and *W. W. Lewis* the lessor and Plaintiff in this case, alleged that this was not the proper way of working the coal under his estate; that the proper way would be to sink pits upon the estate towards the southern side, the expense of which pits was variously estimated at £30,000 to £50,000; that working by instroke was not proper or prudent unless a barrier was left at the boundary of the Plaintiff's estate, and the headings were driven so that they could be stopped as a a protection against water which might come down. The Plaintiff further alleged that coal was not won unless adequate means of draining were provided; that any system of working the coal by dip headings would leave the *Troed-y-rhiw* estate without any provision for working the other seams, and render them of less value, and that the water would accumulate; that the period of three years during which the dead rent was suspended was altogether unreasonable if the coal was merely to be worked by dip headings from the *South Duffryn Colliery*, and that the Defendants could have sunk a pit within the time, and that under the circumstances the dead rent had become payable.

On the 29th of July, 1867, the Plaintiff filed his bill against the lessees, the Defendants, alleging as above stated, and praying that they might be restrained from working by headings or instroke, or otherwise than in a proper and workmanlike manner, and until an adequate means of draining the coal and minerals under the Plaintiff's estate had been provided; that the Defendants might be ordered to pay the dead rent for the three years; and that the articles of agreement might be specifically performed.

The Defendants, by their answer, alleged, that to work by dip headings was proper and customary, and that they had taken all proper precautions against the flow of water; that they would never have taken the lease if they had been obliged to sink a pit; that they were working the coal in a proper manner, and that they had been at all times ready to perform the agreement without suit. They also contended that coal was won when it was reached and could be worked.

Evidence was entered into on both sides as to the proper methods of working coal in general and this coal in particular, the effect of which appears from the judgments of the Vice-Chancellor and the Lord Chancellor. It appeared from the evidence of Mr. *Overton*, who was the Plaintiff's agent at the time of the preparation of the agreement, but was no longer in his employment, that he and the Defendants had discussed the mode of working, and that he was aware that they did not intend to sink a pit, and that he considered working by instroke not improper.

The suit came to a hearing upon motion for decree before the Vice-Chancellor *James*, who, on the 21st of January, 1869, dismissed so much of the bill as prayed for an injunction; declared that the Defendants had taken the necessary steps to win the coal *bonâ fide* and with ordinary dispatch; directed a reference whether anything was due for dead rent and for other matters, and ordered specific performance of the articles of agreement, and a lease to be executed, and ordered the Plaintiff to pay the costs up to the hearing (1).

(1) 1869. Jan. 21. SIR W. M. JAMES, V.C., said that the lease was a mere ordinary mining lease of the coal under a farm of considerable extent, and

The Plaintiff appealed.

Mr. *Jessel*, Q.C., Mr. *Kay*, Q.C., and Mr. *Marten*, for the Plaintiff:—

This is a question of construction on the agreement. We do not say that the pit must be sunk upon the estate, but that there ought to be a pit sunk so as to provide an independent system of drainage, for unless that is done the mine is always in danger. Power to sink a pit is expressly given by the agreement. They

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the Plaintiff's contention was, that a covenant should be implied for working the coal by sinking a pit so as to provide an independent system of drainage for the estate, although it was perhaps not put quite so strongly as that on the evidence. His Honour could not see what power he had to introduce such a covenant as the Plaintiff asked for into a precise instrument like this agreement, more than any other covenant which might be suggested. There seemed to be nothing to prevent the lessees from exercising their legal right and getting the coal by any lawful means, or from working this colliery in conjunction with any other which they might hold; what they were doing had now become a very common method of working mines. The Plaintiff contended, that the Defendants had no right to mine by sinking to the deep so as to expose the deep workings to be drowned out, and that they ought to provide independent means of pumping on the estate itself; but in discussing these questions the Court of Chancery was not a tribunal to determine what was the proper mode of working a coal pit. The Court had only to see whether the lessees were acting *bonâ fide*, and took a reasonable and sufficient amount of care. In this case their proceedings were sanctioned by very eminent engineers, and with that evidence it was impossible for the Court to say that the lessees were acting with *mala fides* or unskilfully. The owners of property of this kind know what they are letting, and it is for them to stipulate for any special provisions which they may think necessary. There was no evidence that any actual damage was done.

As to whether the Defendants had proceeded *bonâ fide* to win the coal, a vast mass of evidence had been entered into. His Honour's view of the word "win" was nearly that of the Defendants, that the coal was won when it was reached so as effectually to be worked. A great number of witnesses stated that the Defendants had proceeded *bonâ fide*, and it was for the Plaintiff to prove *mala fides*, which he had not done. As to the conduct of the Plaintiff in instituting this suit, it was proved that his agent had agreed with the lessees that the proper mode of working this coal was by headings to the deep, and the Plaintiff ought not to have continued this suit when that fact came to his knowledge, though His Honour could not use evidence to control the agreement. His Honour must therefore make declarations the reverse of what was prayed in the bill, but would declare that the agreement ought to be performed, and a lease granted, to be settled in Chambers, and the Plaintiff must pay the costs up to the hearing.

are bound to work the coal in the best way, and not to damage the rest of the coal, and they ought to leave a barrier between their mine and the Plaintiff's mine; at all events they are bound to work the coal so as not to expose the mine to the chance of being drowned out. What we require is a pit deep enough to drain this coal by gravitation. Even if they have been able to work the coal up to the present time, they may still be in danger of being drowned out. All this is so well understood, that no express provision in the agreement was necessary. The three years provided for shew that a pit was contemplated. The Defendants may work these mines so as to allow them to be drowned out, and then become insolvent, leaving the property useless.

Sir *Roundell Palmer*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *Freeling*, for the Defendants, were not called upon.

LORD HATHERLEY, L.C.:—

This case seems to me to be one of the simplest description when we look at the agreement itself and at the evidence adduced, which is not conflicting upon the main points, namely, as to what ought to be the construction of the words "proper and workmanlike manner." Of course when we find words like those, they are open to evidence as to their meaning, because it is a matter, in some degree, of technical knowledge as to what is a proper and workmanlike manner; and in dealing with any special mode of working we must have the testimony of those who are experts as to the meaning of the words as applied to the particular subject matter.

Now the bill is filed upon an agreement entered into in 1864 for the demise by the Plaintiff to the Defendants of certain valuable mining property. The circumstances of the case, as far as they were known to both parties, were these: that the Defendants had other mines immediately to the rise of the property which was agreed to be demised, being separated only by an imaginary line. Of course therefore one mine could be worked from the other if it was right and proper so to do. But the Plaintiff's contention is, that the proper mode of working would be to work his coal just as the Defendants worked the *South Duffryn* pits, namely, to have a pit or series of pits sunk to the depth of the

L. C.
1869
Lewis
v.
Fothergill.

particular vein which they were disposed to work, so that whatever water accumulated in the process of working the mine could be carried off into the pit and pumped up, by which means the mine would be preserved from water; and possibly, or I may say probably, that may be most valuable to the lessor as being the best mode of having the mines on his land worked. But it is clear upon the evidence that this is not the only mode of working in a proper and workmanlike manner.

A proper and workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.

That is the extreme contention on the one side, and the extreme contention on the side of the landlord is to say that those words "proper and workmanlike manner" mean that the lessees are to take means the most expensive possible, and the least likely to produce profit to themselves, for the express purpose of putting the lessor in the best possible position at the time when the lessees give up the mine. Either one or the other of those views is extreme, and we must look to see what the landlord has done with reference to protecting himself by the agreement.

The landlord must be supposed to have known through his agents what it was he was dealing with, and to have known what was the ordinary course of protecting himself if he wished to be protected. Now as to the two systems in question, the one of working by instroke, and the other of working by means of a pit, they occur continually in mining leases, and provisions are often made expressly upon that subject. It so happens that in this case there is no express provision one way or the other; but it appears from the evidence to be very common where working by instroke is intended, to insert a provision that proper barriers shall be kept to protect the mine from the very grievance which is now spoken of, and there is no such provision in this agreement.

But looking further at the agreement, we find a provision for paying a wayleave on minerals brought to surface from the adjoining estate, thus contemplating communication between the two mines, so that not only is there no provision against breaking the barrier, but it is expressly contemplated that the barrier may be broken; and if the Defendants are allowed to break the barrier, what is to prevent their working the coal?

The question of the instroke always has relation to the question of breaking the barrier. If a man has, by the demise, got the right of entry, you tell him that you do not prohibit his breaking the barrier; on the contrary, you tell him that he may pass the barrier, and carry coal and other minerals worked from one side to the other. So long as he works the mine properly there is nothing, as it appears to me, to prevent his using his right of entering through the barrier and working the coal in that way.

Now the lessees say that the pit would be a very serious matter to them. There is no witness who says that it would cost less than £30,000; and the proposition that there is an undertaking on the part of the lessees to expend £30,000, about which nothing is said in the agreement, could only be supported by shewing that there was no other possible mode of working this mine in a proper and workmanlike manner than through the medium of a pit.

Then the Plaintiff further claims £500 a year dead rent because the lessees have not, as he alleges, taken the necessary steps *bonâ fide* to win the coal with ordinary dispatch; and he says, further, that the lessees have begun to work the coal, though they were not bound to do so, but having begun to work it, they have done so in an improper and unworkmanlike manner, and that has occasioned a risk of irremediable injury; and the Plaintiff asks that the lessees shall perform their agreement, and if they cannot perform their agreement, or from any circumstance it cannot be performed, then that there should be an injunction against their working the mine at all.

Now as regards the demand for rent, the ordinary course which this Court always takes with reference to an agreement for a lease of this kind is to say that the Plaintiff shall have specific performance of the agreement, that the deed shall be executed, and shall be dated as on the day of the agreement, so that the lessor can have his action on the covenant as soon as the lease is completed.

I do not find that the Defendants have ever refused to execute the deed, and at the present moment, under the decree of the

Court, they are ordered to execute a proper counterpart, which, when done, would really settle the whole matter with reference to the question whether or not *bonâ fide* steps were taken to win and work the coal. There would be a right to an injunction if, in working the coal, the Defendants were not doing it in a proper and workmanlike manner, and were doing it in such a manner as was most likely to produce irremediable injury. The only real question now is as to who shall pay the costs of the suit.

Then as regards the irremediable damage, and the working in an improper and unworkmanlike manner, we have first to consider whether the working by instroke instead of sinking from the surface is contrary to the provisions of the agreement; and secondly, whether, if it be not contrary to the provisions of the agreement, the Defendants, in working by instroke or dip headings, are working in such a mode as is likely to occasion irremediable damage.

If it were only unworkmanlike it might be left on the terms of the covenant, and damages might be recovered at law; but as far as regards any injunction on account of irremediable injury, we must consider that the bill was filed nearly two years ago, and a year and a half before the close of the evidence; and it appears from the evidence that in January last no injury had been done. The coal had been worked, and the mine had not been flooded.

Further, as to the meaning of "a proper and workmanlike manner," we have the evidence of the agent who signed the agreement on behalf of the Plaintiff, and he says that he never intended anything of the kind, but actually the reverse. It is said, very justly, that we cannot construe the agreement by parol evidence as to what the parties meant by the words; but the words "proper and workmanlike manner" admit of the evidence of experts, for no Court can be so informed upon the subject of mining as to know what is a proper and workmanlike manner. In that point of view nothing can be more satisfactory than to find that the two persons who framed the agreement contemplated the very thing being done that has been done, it being in their judgment proper and workmanlike. And it is a bold measure on the part of a Plaintiff, in that state of circumstances, to come into a Court of Equity to enforce that which is contrary to what his own agent intended and contemplated.

The only answer to this given by the Plaintiff is, that his agent told him a different thing, but that he does not succeed in shewing.

The case, however, does not rest there, because there is a vast mass of evidence before me, which I cannot possibly disregard, to the effect that the mode of working by instroke is proper and workmanlike. It is said that there is a conflict, and of course there is, and always is, on a matter of opinion, but I think the difference may be very easily explained by taking the two views together, the landlord's view and the tenant's view. It is distinctly stated that working by instroke is the system almost invariably practised, unless specifically provided against, in this and other districts when property such as this is worked in connection with large collieries; and many instances in the immediate district are given where larger properties than this are so worked.

There is also a dispute about what is the meaning of the word "winning." I conceive that the coal is won when it is put in a state in which continuous working can go forward in the ordinary way. It is not when you first dig down to a seam of coal and come to water immediately, but when you have got the coal in such a state that you can go on working it, and make provision, if provision is necessary, for sufficient drainage; and in this particular case they say they have got sufficient means of drainage; in fact, I have not heard any suggestion that the mines are being drowned out, and I presume that if it had been so the fact would in some way have been brought before the Court.

The decree of the Vice-Chancellor seems to me to be perfectly correct. As to the £500 dead rent, it appears to me that that will be properly and entirely provided for by saying that the lease shall be dated as at the date of the agreement, but no alteration in the decree is required for that purpose. The appeal will therefore be dismissed, with costs.

Solicitors for the Plaintiff: Messrs. *Cunliffe & Beaumont.*

Solicitors for the Defendants: Messrs. *Vizard, Crowder, & Co.*

L. C.
1869
Dec. 18.

In re CONTRACT CORPORATION.

EBBW VALE COMPANY'S CASE.

Proof in Winding-up—Debts carrying Interest—Leave to appeal—Retrospective effect of Decision of the Court.

The decision in the *Warrant Finance Company's Case* (1) that no proof can be made in the winding up of an insolvent company for interest later than the commencement of the winding-up, was not merely a settlement of the practice for the future, but a declaration of the law as it then stood.

Therefore, where an order for payment of a debt with interest to the date of the proof had been made before the decision of the above-mentioned case, the order was corrected on appeal, leave being given to extend the time for appeal limited by the 124th section of the *Companies Act*, 1862.

[illegible]
5 H.L. 163.
13 Eq. 627
16 Eq. 427
Ch.D. 250

THE *Ebbw Vale Company* carried in a claim under the winding up of the *Contract Corporation, Limited,* for a debt due to them, with interest at £8 per cent. The winding-up commenced on the 21st of April, 1866.

By an order made in Chambers on the 26th of April, 1869, it was ordered that the *Ebbw Vale Company* be admitted creditors of the *Contract Corporation* for the sum of £7950 7*s.* 9*d.*, being the aggregate amount of principal, and interest thereon at £5 per cent. to the 26th of April, 1869.

On the 1st of June, 1869, the Lords Justices decided in the *Warrant Finance Company's Case* (1) that in the case of debts bearing interest creditors were only entitled to prove for interest to the date of the commencement of the winding-up. From this it followed that the order of the 26th of April, 1869, was based upon a wrong calculation.

Accordingly when the certificate was drawn up for payment of a dividend of 6*d.* in the pound to the *Ebbw Vale Company*, the Chief Clerk refused to sign it for the full amount mentioned in the order. On the matter being brought before the Master of the Rolls in Court, His Lordship considered that the certificate must be drawn up in accordance with the order of the 26th of April, 1869, until that order was reversed, and as the time for appealing under the 124th section of the *Companies Act*, 1862, had expired, he directed

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(1) Law Rep. 4 Ch. 643.

L. C.
1869
Ebbw Vale Company's Case.

the matter to stand over in order that application might be made to the Lord Chancellor for leave to appeal.

Mr. *Chitty* accordingly now applied for leave to appeal:—

Where an order is shewn to be erroneous by a subsequent decision of the Court, and the error is not discovered till the time for appeal has elapsed, it is always the custom of the Court to grant leave to appeal. In the present case the error is patent on the order, and it would be a mere matter of course to correct it if the time for appeal had not expired. Several of the creditors acquiesced in the alteration of their dividends, and repaid what had been paid in excess.

Mr. *Jessel*, Q.C., and Mr. *Huish*, for the *Ebbw Vale Company*:—

There is no special cause shewn for granting leave to appeal. The reason given by the Appellant, namely, that the order has been shewn to be erroneous by a subsequent decision of the Court, is no reason at all. It is no excuse for not having taken the opinion of a Court of Appeal at once. But, in truth, the order was not wrong at the time when it was made, and has not been made wrong by the decision in the *Warrant Finance Company's Case* (1). That decision was not retrospective. It merely declared what the practice was to be in future. The Act of Parliament was silent on the subject, and consequently the practice of the Court, which, although not uniform in all the branches of the Court, had been for many years acted upon in the Rolls Court, was valid until it was altered. When that alteration was made, it was merely a judge-made rule, which could not affect what had been done in former cases. Previously the Court had desired to make the practice analogous to that in Chancery: *Kellock's Case* (2); but afterwards it was considered better to revert to the practice in bankruptcy.

Mr. *Chitty*, in reply:—

The decision in the *Warrant Finance Company's Case* was not merely a settlement of the practice for the future, but a declaration of the law to be deduced from the intention of the statute.

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(1) Law Rep. 4 Ch. 643.

(2) Law Rep. 3 Ch. 769.

LORD HATHERLEY, L.C.:—

With regard to the general principle, I do not agree with the argument that where an order has not been appealed from within the time limited, leave to appeal should not be given if the error is shewn to be merely this—that in consequence of a subsequent decision the law there stated has turned out to be erroneous. I cannot doubt that whatever might be the limit of time for appealing, if a person is injured by what has been done under an order, and it is subsequently decided by a higher authority, as, for instance, the House of Lords, that the order was erroneous in point of law, and the error was not discovered in consequence of a previous course of decisions, the Court will give the party an opportunity to appeal in order that upon shewing all the circumstances of the case no injustice shall be done in any past transaction. But in this case Mr. *Jessel's* argument is, that the decision in the *Warrant Finance Company's Case* (1) was only meant for the guidance of the Court in future, and that all that has been done in the offices up to this period of time must be considered to have been consonant to the law until another practice came to be substituted. In connecting all the circumstances of the case, and looking carefully to the course of decision upon the point, I cannot see that that is the correct view of the judgment in the *Warrant Finance Company's Case*. The principle of the decisions was, that there are words found in the Act of Parliament which point to the distribution of the property equally and rateably among the creditors, and the Court held that it was right to stop the interest at the date of the winding-up because it was more analogous to the practice in bankruptcy, where the same equality is pointed at by the statute, than to the practice in Chancery, where the estate may be, and usually is, a solvent estate, and where, at all events, solvent or insolvent, no bankruptcy took place anterior to the person's death. I am quite aware that there has been a question as to the propriety and justice of there being a different rule with regard to insolvent estates after death and insolvent estates during the lifetime of the debtor. But it has long been quite settled that in Chancery the estate is assumed to be solvent, and on that prin-

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(1) Law Rep. 4 Ch. 643.

L. C.
1869
Ebbw Vale Company's Case.

ciple interest on the debts is calculated up to the date of the filing of the certificate. The Lords Justices thought that was not a proper rule to be adopted with regard to the debts which arose anterior to the winding up of a company, and that in that case justice requires that with reference to all the creditors the interest should be stopped from the time of the winding-up. That has been called judge-made law, and it is so in this sense—that the Judges then declared for the first time what the law was; and they declared that according to the true construction of the whole Act of Parliament, and having regard to the objects of the Act, the rule to be adopted ought to be analogous to the rule established in bankruptcy.

It was argued by Mr. *Jessel* that the rule laid down in *Kellock's Case* (1), in cases of winding-up, is not the rule in bankruptcy. But that case turned on a principle of a different kind, namely, that there was nothing in the *Companies Act* which intercepted the original contract existing between the debtor and his creditor, namely, that he was to have the security of the personal estate of the debtor, and at the same time the full security of the mortgage; and therefore the Court would not deprive the creditor of his rights by following the analogy of the practice in bankruptcy, where the position of the creditor was governed by the express enactments of the *Bankruptcy Act*.

As regards the question of disturbing the payments made to other parties under similar orders, the Court must, of course, take care that no injustice is done; but as in bankruptcy and Chancery creditors are admitted after the time at which other creditors come in, but so as not to disturb the dividends which have been previously paid, so here I apprehend when the Court has the control of the funds which have not yet been distributed, it will take care to do justice between the parties, so as not to alter the positions of persons who have been acting under the presumed law of the Court.

The application for leave to appeal must, therefore, be granted; and if the Respondent does not insist on an appeal being formally presented, I will at once make an order discharging the order of the 26th of April, 1869.

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(1) Law Rep. 3 Ch. 769.

L. C.
1869
EBBW VALE COMPANY'S CASE.

Mr. *Jessel* said that after the expression of His Lordship's opinion he would not require an appeal to be presented.

An order was accordingly made discharging the order of the 26th of April, 1869.

Solicitors for the Appellant: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitors for the Respondent: Messrs. *Ashurst, Morris, & Co.*

L. C. and L. J. G.
1869
Dec. 3.

ATTORNEY-GENERAL *v.* CORPORATION OF HALIFAX.

Practice—Leave to withdraw Appeal—Costs—Information.

Where Appellants who have set down their appeal obtain leave to withdraw it, they will only be ordered to pay such costs as they would have had to pay if the appeal had been heard that day and dismissed with costs.

The Relators in an information appealed against the decree of the Vice-Chancellor. After the appeal was set down costs were incurred by an application to the Attorney-General to withdraw his fiat. The Appellants then applied for leave to withdraw the appeal.

The Court, on giving leave, refused to make any special order as to the costs occasioned by the application to the Attorney-General. (1)

IN this case an information and bill had been filed by Messrs. *Houldsworth,* of *Halifax,* for the purpose of restraining the corporation from pouring the sewage of the borough into the *Hebble Brook,* on the banks of which the property of the Plaintiffs was situate. Vice-Chancellor *James* made a decree granting an injunction, and the Defendants presented a Petition of appeal. After the appeal had been set down for hearing, the Defendants made an application to the Attorney-General to withdraw his fiat from the information. On the 30th of November both parties were heard upon this application before the Attorney-General, who refused to withdraw his fiat, but held that he had no jurisdiction to make any order as to the costs of the application.

Mr. *Bristowe,* Q.C., now moved for leave to withdraw the appeal.

Mr. *Ince,* for the Relators and Plaintiffs, made no objection to the withdrawal of the appeal, but asked that the Defendants might

(1) Sc ask then costs, [illegible]

be ordered to pay the costs of the application to the Attorney-General, as well as the ordinary costs of the appeal. If the appeal were simply dismissed with costs, without any direction as to the costs of the application to the Attorney-General, those costs would not be allowed by the Taxing Master, and the Plaintiffs would have no means of obtaining them. The modern practice by which an Appellant was allowed to withdraw his appeal without bringing it to a hearing was an indulgence to him, and the Court would make such order as to costs as might seem equitable. He referred to *Vowles* v. *Young* (1).

LORD HATHERLEY, L.C. :—

The reason of the present rule of the Court as to Appellants withdrawing their appeals is very simple. Instead of being obliged to bring their appeals to a hearing and having them formally dismissed, they are now allowed to withdraw their appeals on condition of paying such costs as the Court shall think fit to direct. But what can the Respondent be entitled to more than the same costs as he would have had if the appeal had been heard and dismissed with costs? It was never intended to put the Appellant under a penalty, and make him pay more than he would have done if the appeal had been brought to a hearing. In the present case the costs in question are either costs in the cause or not. If they are, the Taxing Master will allow them; if they are not, the hardship arises from the fact that the Attorney-General had no power to deal with the costs of the application before him. The same difficulty would have occurred if the application had been made to the Attorney-General before the hearing before the Vice-Chancellor.

Leave will, therefore, be given to withdraw the appeal, and the Appellants will pay such costs as they would have done if the appeal had been heard on this day and dismissed with costs; the deposit to be applied in payment so far as it will extend.

SIR G. M. GIFFARD, L.J., concurred.

Solicitors: Messrs. *Edwards, Layton, & Jaques;* Messrs. *Williamson, Hill, & Williamson.*

(1) 9 Ves. 172.

L. C.
and L. J. G.
1869
Dec. 20, 21.
1870
Jan. 12.

In re FAMILY ENDOWMENT SOCIETY.

Novation of Debt—Annuity granted by Life Assurance Society—Amalgamation of Companies—Companies Act, 1862, *s.* 199—*Unregistered Company dissolved before passing of the Act—Jurisdiction—Place of Business of Dissolved Company.*

9 Eq 306,-8-9,
311,-4.
— 319
846-7-9, 650
5 Ch 389 (n)
396,-3,
— 641,-2,
6 Ch 369,
— 425.
7 Ch 653
Ch D. 315
Ch D. 776

Company *A.*, a life assurance society, granted an annuity, charged upon the assets of the company, to the Petitioner. Afterwards the company was dissolved by resolutions of the shareholders, and its assets transferred to company *B.* By the deed of transfer it was agreed that all the liabilities of company *A.* should be paid out of the assets of company *B.*, and that company *B.* should indemnify company *A.* against them. It was also provided that both companies should use their best endeavours to induce the policyholders and grantees of company *A.* to take in exchange policies and grants of company *B.* The Petitioner received his annuity under his grant from company *A.* before the amalgamation, and afterwards from company *B.*, and gave receipts in the name of company *B.*, until that company stopped payment, but his grant was never exchanged for a grant of company *B.*:—

Held, that he had not accepted company *B.* as his debtor in place of company *A.*

Although slight evidence is sufficient in the case of ordinary firms to shew that a creditor who continues his dealings with incoming partners accepts the new firm as his debtors instead of the old firm, yet strict proof will be required before it is held that a creditor of a company, under a special contract, has accepted the liability of another company with which the first is amalgamated.

An unregistered company was dissolved, its place of business abandoned, and its assets and liabilities transferred to another company, before the passing of the *Companies Act*, 1862. In 1869 a Petition was presented by a creditor, whose debt was still unsatisfied, to wind up the company:—

Held, that the company was carrying on business for the purpose of winding up its affairs within sect. 199, clause 1, and a winding-up order was accordingly made.

The decision of *James*, V.C., affirmed.

THIS was an appeal from an order of Vice-Chancellor *James* directing the *Family Endowment Life Assurance and Annuity Society*, otherwise called the *Family Endowment Society*, to be wound up. The Petition was presented by Major-General *Pott*, an annuitant of the society, under the following circumstances:—

The *Society* was formed pursuant to the provisions of a special Act of Parliament which received the royal assent in May, 1836, by which the *Society* could sue and be sued in the name of any director, or of their chairman or secretary, and persons suing them were authorized to join any proprietor as a Defendant. Judgments also obtained against a director, or the chairman or secretary, might be enforced by execution issued against any proprietor in manner therein provided. A memorial was to be inrolled in Chancery from time to time, containing the names of the officers and proprietors, and the persons whose names should have been last inrolled were to continue liable to actions and suits notwithstanding their having ceased to fill the office or position of director, chairman, secretary, or proprietor.

A deed of settlement of the *Society* was executed, dated the 17th of January, 1837. The clauses of this deed which were specially referred to in the argument were the 2nd, by which the proprietors *inter se* were to be liable only to the extent of their unpaid calls on shares; the 3rd, which defined the objects of the *Society*, one of which was to grant deferred annuities; the 38th, by which power was given to dissolve the *Society* by a resolution of two successive meetings, passed as therein mentioned; the 75th, by which the directors were empowered to make and vary laws and regulations, but not so as to vary the limited responsibility of the shareholders on their respective shares as between themselves; and the 122nd, which it is important to refer to more fully. That section was as follows:—

"That whenever two successive extraordinary general meetings shall, upon the recommendation of the board of directors, have come to a resolution to dissolve the *Society*, the board of directors shall cease to grant or renew any contracts of endowment or assurance on behalf of the *Society*, and shall proceed in such manner as they shall think fair and reasonable to meet the existing engagements of the *Society*, and shall cause so much of the funds or property of the *Society* as shall not then consist of money, and as shall not be required to meet the existing engagements of the *Society*, to be forthwith sold or otherwise converted into money, in such manner and upon such terms as the board shall think proper, and, after such sale or conversion, shall cause so much of the funds or property of the *Society* as shall not be required to meet the existing engagements of the *Society*, to be paid and distributed to and among the several persons then being proprietors or holders

L. C.
and L. J. G.
1869–70
In re
FAMILY
ENDOWMENT
SOCIETY.

of shares in the *Society* rateably and *pari passu*, according to the number of shares held by them respectively; and the directors shall have full, unlimited, and uncontrollable power and discretion to direct and adopt any mode which they may think proper for realizing, dividing, distributing, and finally disposing of the surplus funds and property of the *Society*, and for that purpose to retain and set apart, to such amount as they shall think proper, any moneys to form an indemnity fund to meet the engagements and liabilities of the *Society*, and to deal with such fund in the meantime, until it shall be required for satisfaction of the purposes for which it shall have been set apart, in such manner as they shall think proper; and in the event of there being a surplus of such fund after satisfying all the engagements and liabilities of the *Society*, the board of directors shall, as soon as conveniently may be after such surplus shall be ascertained, convert the same into money, and distribute and divide the proceeds among the several persons being proprietors or holders of shares in the *Society* at the time of the dissolution thereof, and their respective executors, administrators, and assigns. And the further to enable the board of directors to carry into effect a dissolution of the *Society*, and to wind up the affairs thereof, it shall be lawful for them to adopt any plan which in their judgment shall be deemed expedient for paying to the proprietors or holders of shares in the *Society*, or placing at their risk, their several proportions of the surplus funds of the *Society*. And the persons who shall be directors at the time of passing the resolution for dissolving the *Society* shall continue in such office until the affairs of the *Society* shall be finally wound up, and shall and may fill up, if they think proper so to do, any vacancy which may occur among themselves during such period, and the persons so elected to fill such vacancies shall have, exercise, and enjoy all the powers and authorities hereby conferred upon directors of the *Society* as fully and effectually to all intents and purposes as though they had been elected by the proprietors at an annual general meeting under the provisions in that behalf hereinbefore contained: Provided nevertheless, that in case the funds or property of the *Society* at the time of such dissolution shall be insufficient to pay the existing claims and demands upon the *Society* in respect of the assurances effected by the *Society;* then and in that case the board of directors shall, under the powers hereinbefore contained, from time to time as they shall think proper or find it necessary, call upon the proprietors of the *Society* for the payment of such further instalments on their shares in the capital of the *Society* as shall be sufficient to make up the deficiency in such funds or property for payment of the existing claims and demands upon the *Society*, and shall distribute the amount of such further instalments, together with such funds or property as aforesaid, among the several claimants in respect of the assurances effected by the *Society* in full satisfaction of their respective claims and demands rateably and in proportion to the amount of their respective claims and demands upon the *Society*, and when and so soon as such payment and distribution shall be completely made and effected the *Society* shall be dissolved, and every clause, article, matter, and thing herein contained (except this present provision) shall thenceforth cease, determine, and be void."

On the 12th of March, 1849, the *Society* entered into a contract with the Petitioner for payment to him of an annuity of 1000 rupees, commencing on the 26th of August, 1861. The contract was headed "*The Family Endowment Life Assurance and Annuity Society—Indian Branch*," and was in the following terms:—After reciting that *Stephen Pott* had proposed to contract with the *Family Endowment Society* for the purchase of an annuity of 1000 Company's rupees, to commence at such time, to continue payable such period, and to be paid in such manner as thereinafter stated, and had delivered into the office of the said *Society* a statement in writing, dated the 26th of February, 1849, containing the terms and stating the facts and circumstances upon and in reference to which the said contract was proposed to be effected, and which statement he thereby agreed should be the basis of his contract with the said *Society*, It was witnessed that it was thereby declared on behalf of the said *Society* by the three directors whose names were thereunto subscribed that in consideration of the sum of 37 Company's rupees, then paid by the said *Stephen Pott* to the said directors, and in case the said *Stephen Pott* should on the 26th day of each succeeding month in every year, until and including the 26th of January, 1861, pay unto the directors of the said *Society* for the time being the said monthly premium of 37 Company's rupees the funds of the said *Society* should be liable according to the provisions of the deed or deeds of settlement of the said *Society* to the payment to the said *Stephen Pott*, or his assigns, of an annuity of 1000 Company's rupees (together with an aliquot share of such further sum or sums (if any) as should be assigned to or in respect of the said contract, pursuant to the rules and regulations for the time being of the said *Society*, or by way of bonus or addition to the assurance thereby made), such annuity to commence on the 26th of August, 1861, if the said *Stephen Pott* should be then in *India*, but to commence on the 26th of February, 1862, if the said *Stephen Pott* should be then in *Europe*, and to continue thenceforth payable during the natural life of the said *Stephen Pott*, and to be paid by equal half-yearly payments on the 26th of August and the 26th of February in every year, but no proportional part of the said annuity was to be paid for the period (if any) which should elapse between the determination of the said annuity and the last preceding day of payment. The contract then contained a proviso that in case any untrue or fraudulent allegation should be contained in the said statement so delivered into the office of the said *Society* as aforesaid, then the contract should be void, and all moneys paid thereunder should be forfeited to the said *Society*: Provided also, that the contract and the annuity thereby assured should be subject to the conditions thereupon indorsed, and also that the subscribed capital of £500,000, and the stocks, funds, securities, and properties of the said *Society* remaining, at the time of any claim or demand made, unapplied and undisposed of in pursuance of the provisions and authorities contained in the said deed or deeds of settlement should alone be liable to answer and make good all claims and demands upon the said *Society*, and that no director or other proprietor of the said *Society*, his heirs, executors, or administrators, should by reason of any contract, or of the whole of the contracts taken together which any director had signed, or might sign, be in anywise individually subject or liable to any such claims or demands beyond the amount of the unpaid part of his share or shares in the said subscribed capital of £500,000.

On the 11th of June, 1850, a similar contract was entered into

L. C.
and L. J. G.
1869–70
In re
FAMILY
ENDOWMENT
SOCIETY.

between the *Society* and the General, whereby in consideration of payments to be made by him, ceasing before the commencement of the annuity, another annuity of 1000 rupees was granted, commencing on the 1st of December, 1857, or the 1st of June, 1858, and charged in like manner alone upon the capital and assets of the *Society*.

Early in 1861 arrangements were contemplated for closing the business of the *Society*, and transferring its assets and liabilities to another company, then called the *Albert and Medical Life Assurance Company*, and articles of agreement were executed on the 5th of February, 1861, by the directors of the *Society* on the one part and the directors of the *Albert Company* on the other part, whereby, subject to the approval of extraordinary general meetings of the proprietors of the *Society*, it was agreed, for the considerations therein mentioned, that as from the 1st of January, 1861, the business of the *Society* should be deemed to have been transferred to and vested in the *Company*.

By the 2nd clause of this agreement, all the property, credits, securities, and effects of the *Society* were, as from the same date, to become the property of the *Company*, and to be transferred to them.

The 3rd clause provided that all the debts, engagements, and liabilities of the *Society*, and all claims against them should be wholly paid and performed by the *Company*, who were at all times to indemnify the *Society*, its officers and shareholders, in respect thereof.

The 5th clause provided that all premiums and other sums of money after the 1st day of January, 1861, paid or payable in respect of policies of assurance, or upon or in respect of endowments, grants, or engagements of the *Society* in force on that day, should belong to and be the property of the *Company*; and all risks, engagements, and liabilities upon or in respect of all such policies, endowments, grants, or engagements, and also all charges and expenses connected therewith, should be borne and paid and satisfied by and out of the funds of the *Company*.

The 6th clause provided that the *Society* and the *Company* should respectively use their best endeavours to procure the several persons holding or entitled to policies, endowments, grants, deeds of covenant, or other engagements of the *Society*, to accept in exchange or in renewal policies, endowments, grants, deeds of covenant, or engagements of the *Company;* and the *Company* would, at their own expense, on the application of the persons interested therein, respectively grant, execute, and deliver, such substituted and renewed policies, endowment grants, deeds of covenant, or engagements, to the several persons willing to accept the same.

The 8th clause provided that the books of the *Society* should be handed over to the *Company,* and the *Company* were authorized to use the names of the directors of the *Society* when necessary.

The proprietors of the *Society* held meetings in March, 1861, pursuant to their deed, at which they agreed to dissolve their *Society,* and to hand over their assets to the *Albert Company* for the considerations mentioned in the agreement of February, and upon the terms mentioned in that agreement. The proprietors of the *Company* seem generally to have acquiesced in the arrangement, and from the time of the agreement the *Albert Company* transacted at the offices of their *Company* all the business formerly carried on by the *Society,* and intermingled the business transferred to them with their own business, at the same time changing their title of *Albert and Medical Life Assurance Company* to that of *Albert Medical and Family Endowment Assurance Company.*

The *Family Endowment Society* from the period of dissolution in 1861 entered into no new business, and retained no active staff, and the only memorial containing the names of directors, inrolled pursuant to their special Act, was inrolled on the 17th of August, 1836. The place of business where the *Society* carried on its business up to the dissolution was pulled down, and they had no place of business after the beginning of 1861.

General *Pott* received the earlier payments of his two annuities from the *Family Endowment Society,* and after the amalgamation he received them from the *Albert Company.* On each occasion of his receiving payment he had to produce a certificate of his existence and identity. The certificates were in the following form:—

"To the Directors of the *Albert Medical and Family Endowment Life Assurance Company.*

"7, *Waterloo Place, Pall Mall.*

"I hereby certify that Colonel *S. Pott,* described in an annuity grant of the *Albert Medical and Family Endowment Life Assurance Company* as of *Melrose*, and whose signature is affixed below, is now living at *Melrose*. Dated at *Melrose*, the 5th day of March, 1863."

On each occasion receipts were signed in the following terms:—

"Dated 5th March, 1863.

"Received of the directors of the *Albert Medical and Family Endowment Life Assurance Company* the sum of fifty pounds, being half-year's annuity on the life of *Stephen Pott* due on the 26th day of February, 1863, under the *Company's* annuity policy, grant No. 2.

"Half-year's annuity, £50.

S. Pott."

In some of the subsequent certificates and receipts the *Company* is described simply as the *Albert Life Assurance Company*.

The Petitioner was cross-examined, and admitted a general knowledge of the amalgamation of the *Family Endowment Society* and the *Albert Company*, by virtue of which he understood, to use his own expression, that "the *Family Endowment and Albert Companies* were one;" and that he went in August, 1862, and on some subsequent occasions, to the office of the *Albert Company*, and there received his annuity; but he stated that afterwards the annuity was received for him by the *Oriental Bank* until the month of August, 1869, when the *Albert Company* stopped payment. His cross-examination is more particularly referred to in the judgment of the Lord Chancellor.

The *Albert Company* was ordered to be wound up in 1869, and General *Potts* then presented the present Petition for an order to wind up the *Family Endowment Society* also, which was made by the Vice-Chancellor. [W N (1869) 239

The Appellants were Mr. *Lawrence* and others, shareholders in the *Family Endowment Society*.

Sir *Roundell Palmer*, Q.C., Mr. *Higgins*, and the Hon. *Walter Bethell*, for the Appellants:—

This Petition cannot be supported, on two grounds: First, that the Court has no power under the *Companies Act*, 1862, to wind up the *Family Endowment Society;* Secondly, that the Petitioner has no debt against the society.

With respect to the first point. This *Society* was not registered, and if it is to be wound up at all under the Act, it must be under the 8th part of that Act. But it had been dissolved and had ceased to exist before the passing of the Act, and the Act could therefore have no operation upon it. The words in sect. 199 (1), clause 3, "whenever the company is dissolved," do not apply to the time of the passing of the Act, but to the time when it is to be put in operation. Nor can it be said that this *Society* was at the date of the Act "carrying on business for the purpose of winding up;" for previously to the Act of 1862 there was no Winding-up Act applicable to it.

Clause 1 of the same section is decisive that the Act cannot apply to companies which have ceased to exist, for it enacts that "An unregistered company shall for the purpose of determining

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(1) The material part of sect. 199 is as follows:—

"Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act; and all the provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions:—

"(1.) An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the *United Kingdom* where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the *United Kingdom*, then in each part of the *United Kingdom* where it has a principal place of business. Moreover, the principal place of business of an unregistered company, or (where it has a place of business situate in more than one part of the *United Kingdom*) such one of its principal places of business as is situate in that part of the *United Kingdom* in which proceedings are being instituted, shall for all the purposes of the winding up such company be deemed to be the registered office of the company.

"(2.) No unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the Court.

"(3.) The circumstances under which an unregistered company may be wound up are as follows (that is to say):

"(*a.*) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs.

"(*b.*) Whenever the company is unable to pay its debts.

"(*c.*) Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

L. C. and L. J. G.
1869-70
In re FAMILY ENDOWMENT SOCIETY.

the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the *United Kingdom* where its principal place of business is situate." This *Society* had no place of business at the time when the Act was passed, and it would therefore be impossible to ascertain the Court which had jurisdiction.

Secondly, we contend that the Petitioner has transferred his debt from the *Family Endowment Society* to the *Albert Company*. The 38th section of the deed of settlement of the *Society* gave the directors power to dissolve the *Society*, and the 75th to make new laws and regulations, and the 122nd prescribed how the dissolution was to take place, and provided for the satisfaction of all the liabilities of the *Society*. Everything was correctly and legally performed; annuitants and other creditors were given a better security than they had before; for they had all the funds which were handed over by the *Family Endowment Society*, and besides, the security of the funds and unpaid capital of the *Albert*. General *Pott* might have interfered at the time and obtained an injunction against the amalgamation until he was satisfied: *Kearns* v. *Leaf* (1); *Evans* v. *Coventry* (2). But not having done so, he is now bound by his acquiescence.

It is clear from General *Pott's* own admissions that he was perfectly acquainted with the fact of the amalgamation, and for six years continued to receive his annuities from the *Albert Company*, and to give receipts to them. In the first receipt produced in evidence the words "*Albert Medical and*" are inserted in his own handwriting. His conduct is quite sufficient to establish a novation of the debt according to the authorities: *In re Commercial Banking Corporation of India and the East* (3); *Ex parte Gibson* (4); *Benson* v. *Hadfield* (5); *Rolfe* v. *Flower* (6); *Thompson* v. *Perceval* (7); *Hart* v. *Alexander* (8); *Era Company's Case* (9); *William's Case* (10); *Teete's Case* (11).

Mr. *Kekewich*, for other shareholders.

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(1) 1 H. & M. 681.
(2) 5 D. M. & G. 911.
(3) 16 W. R. 958. WR (1868) 166
(4) Law Rep. 4 Ch. 662.
(5) 4 Hare, 32.
(6) Law Rep. 1 P. C. 27.
(7) 5 B. & Ad. 925.
(8) 2 M. & W. 484.
(9) 1 D. J. & S. 29.
(10) 1 H. & M. 672.
(11) 12 W. R. 701.

L. C.
and L. J. G.
1869–70

In re
FAMILY
ENDOWMENT
SOCIETY.

Mr. *Fry*, Q.C., and Mr. *Westlake*, for the Petitioner:—

With respect to the jurisdiction of the Court to make the order, the *Society* falls within the 8th part of the *Companies Act*, 1862. It was still in existence for the purpose of being wound up. The effect of the amalgamation was not to dissolve it until all its liabilities were discharged. This is clear from the 122nd clause of the deed of settlement, and the indemnity clause of the deed of transfer treats the *Society* as still in existence. The application of the Act to a *Society* in such a position is not *ex post facto* legislation. It is merely providing a new process for enforcing existing rights. If the Act had not been passed, the creditors might have proceeded against the directors and shareholders under their private Act, and the *Society* might have been wound up in bankruptcy.

The first clause of the 199th section of the Act introduces no difficulty, for the place of business of the *Society* was the office of the *Albert Company*.

With respect to the alleged novation of the debt, the effect of the contract of amalgamation was, that the *Albert Company* agreed to indemnify the *Family Endowment Society* against their liabilities, which were limited by the amount of the share capital of the *Society*, and that if the policy-holders chose to accept a new policy from the *Albert Company* they might do so; but if they did not, the mere fact of their receiving payment of the annuities from the *Albert Company* was no novation of the debt. The *Albert Company* paid as the agents of the *Family Endowment Society*. The receipts were properly given to the *Albert Company*, for they paid the money, but the certificates refer to the original contracts. In all cases of novation the new contract is the same as that for which it is substituted. But here the new contract alleged to have been made with the *Albert Company* is quite different from the original contract. The cases cited on the other side were cases of ordinary contracts, and in most instances were ordinary partnerships, where the creditor continues to deal with the incoming partners, and are very different from the case of a special contract like this.

Sir *Roundell Palmer*, in reply.

1870. Jan. 12. LORD HATHERLEY, L.C.:—

The Petition of appeal in this case is presented by a contributory of the *Society* against an order of the Vice-Chancellor *James* made on the Petition of General *Pott*, by which the Vice-Chancellor directed the *Society* to be wound up, and gave certain directions as to costs. The Appellant alleges that the order is erroneous on two grounds: first, that the *Society* is not within the purview of the *Companies Act*, 1862; secondly, that if this be not so, yet General *Pott* is not entitled to apply for a winding-up order on the ground that, although he was originally a creditor of the *Society*, he has ceased to be so, and has accepted the *Albert Life Assurance Company* as his debtors in lieu of the *Society*. The facts are as follows:—[His Lordship then stated the facts as detailed above, and continued:—] This is the proper place at which to pause with reference to the first question, as to whether or not the *Society* is within the purview of the *Companies Act*, 1862. It is contended that the 8th part of the Act of 1862 is inapplicable to any company in such a position as that in which the *Family Endowment Society* was placed at the passing of the Act; that the *Society* had been dissolved in March, 1861, more than one year before the passing of the Act; that it had ceased to carry on business, and that by the agreement with the *Albert Company*, which it is said the directors of the *Family Endowment Society* were fully authorized to enter into, the *Society* had parted with its assets, that the shareholders of the *Society* had been paid all that they would be entitled to under the agreement, and that the payment of the creditors had also been provided for by the agreement. In support of this view it was further argued that the very terms of the 199th section of the Act point to companies still carrying on business, by defining the jurisdiction of the Court with reference to the position of the place of business of the company within the *United Kingdom*, whereas the *Society* had, at the passing of the Act, no place of business whatever. I think that these arguments cannot prevail. The *Society* was originally a *Society* or company of more than seven members, carrying on business in the *United Kingdom* at a definite place of business, and was not a registered company under the Act of 1862. Let us suppose that it had been properly dissolved a week or two before the passing of that Act of Parliament, but had still to wind up its affairs in the usual manner. The obligations of such a company, from their very nature, would require time for their complete fulfilment. The object of the Act of 1862 was to give to joint stock companies and to those dealing with them an efficacious mode of winding up their affairs, and dissolution is the very condition of a company which is first set forth in sect. 199 as properly calling for the intervention of the Court. The contract of partnership is, no doubt, put an end to as regards the future by dissolution, but the rights of the parties *inter se*, and the rights of third parties as against them, have after dissolution yet to be adjusted, and for that purpose all the provisions of the original contract must be applied. All well-drawn deeds of settlement make provision for that purpose, and the present deed of the *Family Endowment Society* is not an exception. The 122nd section of that deed properly directs that all the powers of the directors shall continue for the complete winding up of the concern. The creditors of the concern, in the case which I have put of dissolution immediately before the Act, could have proceeded against the *Society* in bankruptcy, or could, by actions against the officers, obtain judgments, to be enforced under the special Act of 1836, as against the proprietors, to the extent of the unpaid calls. The shareholders would, but for the Act of 1862, have been compelled in case of dispute to seek relief in Chancery for the adjustment of their rights. Can it be said that this state of things was not one for which the statute of 1862 intended to provide a more adequate remedy, without, indeed, creating a new right? I think not. Ought the circumstance, then, of the assignment of the assets and the transfer of the place of business to the *Albert Company*, and the assumption by that company of the liabilities of the *Society*, to make any difference in the construction of the Act as to its applicability to the *Society?* The creditors are not parties to the agreement between the *Society* and the *Company*, and in the consideration of this question of the applicability of the Act I ought to assume that they have not acquiesced in the provisions of that agreement. The Act was intended, as I hold, if this agreement had not existed, for the benefit of such creditors, and a transaction behind their backs cannot deprive them of that benefit. With reference to the directions

L. C. and L. J. G.

1870

In re FAMIL ENDOWMENT SOCIETY.

contained in the 199th section as to the jurisdiction of the Court, which is to be ascertained by the principal place of business of the company in the *United Kingdom*, it is obvious that in the case of companies which should cease after the passing of the Act to carry on business (mentioned in the sub-section of sect. 199) the place where it was carried on before such cesser must be intended, and the same construction would be proper in a case where the business had ceased before the Act, but the concern had not been wound up. I cannot doubt, therefore, that the *Society* in question was within the purview of the Act so long as there remained anything to be done with reference to the winding up its affairs, either as regards the parties *inter se*, or the creditors of the *Society*. Of course, if all the rights of the proprietors and creditors had been ascertained and satisfied, the Act would have had no room for application to the case of such a company.

The second question of this appeal is, whether General *Pott* is in effect to be deemed to be a creditor of the *Family Endowment Society*. That he was originally such a creditor under the two contracts of 1849 and 1850 is not disputed, but it is said that he must be taken to have accepted the *Albert Company* as his debtors in substitution for the *Society*, who, to the extent of their assets, including calls payable under their deed of settlement, were his original debtors. He admits in his evidence that he was aware of the *Society* having made an arrangement with the *Albert Company* by which, as he expresses it, he thought " they and the *Albert* were one." He does not recollect receiving the circular said, but not proved, to have been sent round to all the policy-holders; but I do not think it would have made any material difference if he had done so, for reasons not necessary to enter into. He admits attending at the office of the *Albert Company* for payment of his annuity, or receiving it through his bankers, from August, 1862, down to June, 1869, shortly before the stoppage of the *Albert Company*, and certain receipts and certificates are put in evidence which are of importance in this part of the case. The *Albert Company* in making payments to the grantees of annuities required a certificate of the grantee's existence and identity, and the certificates were in this or a similar form :—[His Lordship read one of the certificates and one of the receipts, and continued :—] In the certificate of August,

L. C. and L. J. G.
1870
In re FAMILY ENDOWMENT SOCIETY.

1864, the General is mentioned as "described in a grant of the *Albert Life Assurance Company*," and some, but not all, of the subsequent receipts mention the money to be received of "the *Albert Life Assurance Company*." Now, the question is whether, under all these circumstances, the General accepted the total change of contract necessary to substitute the *Company* for the *Society* as his debtors. The question is one of fact. It was justly, I think, observed by the learned Vice-Chancellor, in his judgment, as it had previously been observed by other Judges, that very slight evidence is sufficient in the course of dealing between a customer and a firm, subject to change by the retirement of old partners and the introduction of new, to shew that the customer continuing his dealings accepts the new firm as his debtors in lieu of the older firm, though even then it is necessary that knowledge of the change in the firm should be brought home to the creditor. The cases which have occurred on the subject are usually cases of business of an ordinary character, where the new partner simply unites with others in carrying on a business in a settled course, and the invoices or pass-books in the case may afford evidence of the change of firm. But that which has here to be proved is that a creditor having an instrument upon which he can rely as creating a right of suit against all the assets of the *Society* with which he deals, including all the unpaid calls for which the proprietors are liable, has abandoned that definite claim for a claim upon the assets of a *Company* with which he has no direct contract, including the liability (if any) of the shareholders in that other company for calls. The General has never been asked to enter into any fresh contract, by which such substitution might have been effected beyond all doubt. He has paid in nothing to the new *Company*, for all the payments on his part had been made before the arrangement between the *Society* and the *Company*. He has given receipts for payments of his annuity, which are expressed in the first receipt to be for payments made by the *Albert Medical and Family Endowment Society* on annuity No. 2, and in the first and following certificates signed by him, he is referred to as described in an annuity grant of the *Albert Medical and Family Endowment Life Assurance Company*. He must, therefore, be taken as founding his claim on this grant, and to have given his receipt in respect of it. No other grant can

L. C. and L. J. G.

1870

In re FAMILY ENDOWMENT SOCIETY.

be produced than that made originally by the *Society*. Why should he be led to suppose in thus acting that the new *Company* from whom he received the money had treated this grant as one binding on all their own proper shareholders, and were not acting as agents for the *Society*, making the payments out of the assets, which by the terms of the grant formed the proper fund for that purpose? There would be nothing necessarily inconsistent with the union of the *Society* and the *Company* (the fact of which union the General admits he knew), that the *Company* should keep the assets of the *Society* distinct from their own, and should, as agents of the *Society*, make out of such assets all the payments to which they were liable, and which might not be otherwise provided for by the acceptance, on the part of the creditor, of a substituted policy or grant, whatever the arrangements might be as to the balance. The General could not have sued the *Albert* shareholders, as he might, under the special Act, have sued and obtained judgment against the shareholders of the *Society* to the extent of their calls, and he cannot be affected by the provisions of the deed between the companies, to which he was no party, and of the provisions of which no knowledge can be imputed to him. It was said he might have obtained an injunction to prevent a transfer of the assets. But why should he do so, if he were satisfied with the liability of the proprietors for their calls? The union of two companies, formed originally under separate deeds, by which the proprietors respectively stipulate for a limited liability—viz., a liability to the extent of the assets and of the calls due from themselves, is a very different thing from the admission of a new partner into an existing firm, with all the usual consequences of such an admission; and the abandonment by a creditor of a written definite contract with one company for an unwritten engagement by a new company, to be arrived at through the medium of very special arrangements between the two companies, is a matter requiring far more cogent and precise proof than the assumption by a continuing customer of the liability of the firm with which he continues his dealing, in lieu of that of its immediate predecessor. Here the *Albert Company*, which, by the stipulations of its agreement, might have made provision for substituting a new contract, continued to make payments and take receipts on the footing of the original

L. C. and L. J. G.
1870
In re FAMILY ENDOWMENT SOCIETY.

contract. It would much shake public confidence in dealing with assurance companies, and would therefore be greatly to the detriment of such companies, no less than to that of their customers, if the Court were to hold that a person having the security of the assets of one company should be deemed to have discharged those assets, and to have accepted the liability of another company, merely because the second company, possessing the assets of the first, pays to the creditor his growing annuity on the footing of his grant. Something more is required, as it seems to me, to bring home to the annuitant a knowledge that by such payment, which might well be made out of the transferred assets, the new company intends to enter into a new contract with him for payment of his annuity out of a totally different fund. I have assumed that all the proceedings between the *Society* and the *Company* were warranted by their respective deeds, and there is no necessity for me to raise any doubt upon that subject, for my decision is independent of that question; but one cannot help observing the great difference that exists between an ordinary succession in a partnership and a transaction of this nature. In order to prove the acquiescence of a creditor to the change of his debtor he must be assumed to have satisfied himself that the substitution could legitimately be made —an assumption in the highest degree improbable. On the other hand, nothing could be more easy than for the new company, if it so intended, to obtain a clear recognition of their new contract by the General, or the equally clear rejection of it. I am of opinion, therefore, that the judgment of the Vice-Chancellor is correct, and that the appeal must be dismissed, with costs to be paid by the Appellant to General *Pott*.

SIR G. M. GIFFARD, L.J.:—

Two questions were argued and have to be decided in this case. One, whether the *Family Endowment Society* is within the operation of the *Companies Act*, 1862. The other, whether General *Pott* has continued or ceased to be a creditor of the *Society*. It was argued that the *Family Endowment Society* was not within the operation of the Act of 1862, because it was an unregistered company; because it could not have been wound up under any Act which existed previously to its dissolution, though liable to be made bankrupt—not a practical or effective remedy—and because it ceased to carry on business, or have any place of business, and was dissolved and amalgamated, as it is termed, with the *Albert Company* before Nov. 1862. In answer to the facts so alleged in argument it was said, and truly said, that a creditor of the *Society* could and can sue under the *Society's* private Act of Parliament, which gives remedies against its directors and shareholders, and that amongst other Acts repealed by the Act of 1862 is that under which the *Society* might have been made bankrupt, and observations were made on the *Companies Act.* The 205th and 207th sections of the *Companies Act,* 1862, are the repealing sections. The 2nd section of the Act enacts that the Act is not to come into operation until the 2nd November, 1862. The Act recites that it is expedient that the laws relative to the incorporation, regulation, and winding up of trading companies and other associations should be consolidated and amended, and was passed on that footing and for that purpose, and the 199th section is as follows:—[His Lordship read the material part of the section.] It is to be observed that the Act is a remedial Act, that it gives new remedies in respect of of old existing rights, and that as regards creditors generally it takes away some of their remedies and gives them others and more effective ones. If, therefore, there be a society or association not registered under the Act, consisting of more than seven members, and the Petitioner is a creditor for more than £50, and the company, in the terms of the Act, "is dissolved, or has ceased to carry on business," there seems no reason why the creditor should not have his remedy under this Act, unless by its terms he is plainly excluded. That there is such a *Society* or *Association* in existence I can have no doubt, for whatever resolutions the shareholders may have passed *inter se* with reference to a dissolution they have and had no power to extinguish, and could not and cannot extinguish, the *Society* or *Association,* or their liabilities as shareholders, as against any unsatisfied creditor. A society or association which is in a sense dissolved is expressly liable under the sections referred to. The only argument on the actual terms of the 199th section really was on the use of the present tense, and particularly the word "is." One finds a frequent repetition of this word—not, however, for the purpose of fixing any particular time at which the business must be, or have been carried on, but for the purpose of fixing the domicil of the company—and I feel no difficulty in holding the meaning of the first part of the section to be, that an unregistered company shall be deemed to have been registered at its principal place or places of business. Where the dissolution of a company is referred to "is" plainly means "has been," and I am further of opinion that the *Albert* office might, under the circumstances, well be deemed to be the office of the society. There are, therefore, no grounds for holding that the *Family Endowment Society* is not within the operation of the *Companies Act*, 1862.

The next question may be disposed of as readily as the first. General *Pott* paid the *Family Endowment Society* before its dissolution or amalgamation certain sums of money, in respect of and in consideration for which two annuities were granted to him. He neither paid any sum of money to, nor received any grant from the *Albert Company*, nor was there any written contract of any kind between him and that company, or any communication from the company to him, or from him to the company, of the terms of any contract between him and them. The contracts between General *Pott* and the *Family Endowment Society* are contained in two written documents, each signed by three directors of the *Society*, and each in the particulars material to this case substantially to the same effect. [His Lordship read the first contract, and continued :—]

It is needless to mention that this contract is of a special nature.

The dissolution of the *Family Endowment Society* and its amalgamation with the *Albert Company* took place early in 1861. General *Pott* was cross-examined. He admitted that he learnt of the dissolution of the *Family Endowment Society* from the newspapers, that he talked of the amalgamation with his friends, that he applied to the *Albert Company*, and received payments of his annuity from them; but not, he says, in pursuance of any written direction from the *Albert Company*. The receipts given to the *Albert Company* are in evidence. The first of them is for the amount due on the 26th of August, 1862, and they continue down to 1869. They were accompanied with certificates. The receipts purport to be given to the *Albert*, or the directors of the *Albert Company*, in consideration of payments made by the *Albert Company*, or the directors of the *Albert*

Company. One of the certificates is in the following form:—[His Lordship read one of the certificates.] I take them as samples; they are receipts and certificates having reference to the subsisting grants—no new grant to, or contract with, General *Pott* is suggested. The terms of the arrangement between the *Family Endowment Society* and the *Albert Company* were not disclosed to General *Pott*, no assent to any new contract was asked for, the assets and share capital of the *Family Endowment Society* were made liable by the grants of annuities to General *Pott*, and could, as against General *Pott*, be dealt with as being so liable; nothing short of a new contract between him and the *Albert Company* in discharge of his rights against the *Family Endowment Society* could amount to an extinguishment of those rights. There was, it is true, a direct contract as between the *Family Endowment Society* and the *Albert Company.* The 5th and 6th clauses of the deed of transfer are as follows:—[His Lordship read the clauses.]

Either the *Society* or the *Company* might have taken action on this 6th clause, but as regards General *Pott* neither of them did so. The actual contract between the *Society* and the *Company* might well have been very different to what it was. It was not incumbent on General *Pott* to make inquiries as to the terms of arrangement between the *Society* and the *Company*, nor can a knowledge of them be imputed to him. The arrangement might well have been, and, in the absence of assent from General *Pott* to the contrary, ought to have been, that the assets and capital of the *Society* should remain liable under the annuity grants; it was incumbent on those who desired that the old contract should be superseded by a new one to make proposals to that effect, or take steps for that purpose, but they forbore or neglected to do so. The whole question is one of fact, as is clear from the authorities; and, on the facts, I am of opinion that General *Pott* remained, and continues to be, a creditor of the *Family Endowment Society*, and never agreed to become a creditor of the *Albert Company.*

In the course of the argument the 122nd clause of the *Family Endowment Society's* deed of settlement was referred to. There were also suggestions that an action ought to be brought, and that there are equitable reasons why a winding-up order should not have been made. The 122nd clause assists the Respondents rather than the

L. C. and L. J. G.
1870
In re FAMILY ENDOWMENT SOCIETY.

Appellants. General *Pott's* debt is clearly due from the *Society.* He has entered into no new contract. He has done nothing to disentitle him to his plain rights, and there is every reason why a winding-up order should have been made. The appeal must, therefore, be dismissed with costs.

Solicitors for the Petitioner: Messrs. *Clayton & Sons.*

Solicitors for the Shareholders: Messrs. *Maynard & Co.;* Messrs. *Freshfield.*

In re PHENÉ'S TRUSTS.

L. J. G.
1869
Dec. 18, 21, 22.
1870
Jan. 11.

11 Eq 236 - d
240 - d
[illegible]
3 P. M. 18
19 Eq 371
20 Eq 137
14 Ch D 84

Presumption—Evidence of Death—Person not heard of for Seven Years—Onus probandi.

If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards.

A testator died on the 5th of January, 1861, having bequeathed his residuary estate equally between his nephews and nieces. One of his nephews, *N.*, was born in 1829, had gone to *America* in 1853, had frequently written home till August, 1858, when he wrote from on board an American ship of war, but from that time no letter had been received from him, and nothing was afterwards heard about him, except that he was entered in the books of the American Navy as having deserted on the 16th of June, 1860, while on leave:—

Held (reversing the decision of *James*, V.C.), that his personal representative had not established a title to any share of the testator's estate, and that it must be divided among the nephews and nieces who were proved to have survived the testator.

Thomas v. *Thomas* (1), and *In re Benham's Trusts* (2), overruled.

THIS was an Appeal Petition from an order of Vice-Chancellor *James*, who, in deference to decisions of Vice-Chancellor *Kindersley* and Vice-Chancellor *Malins*, from which he expressed his dissent, had decided that *Nicholas Phené Mill*, who had not been heard of since June, 1860, was to be presumed to have survived the testator, *Francis Phené*, and so to have become entitled to a share in the testator's estate.

The testator died on the 5th of January, 1861, having by his will bequeathed the residue of his estate to his nephews and nieces in equal shares. *Nicholas Phené Mill* was one of his nephews. The share to which *Nicholas Phené Mill* would, if living at the testator's death, have been entitled, had been paid into Court under the *Trustee Relief Act* on account of it being uncertain whether he had survived the testator.

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(1) 2 Dr. & Sm. 298.

(2) Law Rep. 4 Eq. 416.

L. J. G.
1869–70
In re PHENÉ'S TRUSTS.

On the 24th of April, 1869, letters of administration to the estate of *Nicholas Phené Mill* were granted to his brother, *James Alexander Mill,* who then presented a Petition for payment of the fund to him.

It was shewn that *Nicholas Phené Mill* was born at *Ostend* in 1829; that he left his parents' home on the 19th of August, 1853, and went to *America;* that he frequently wrote thence to his family; that he wrote to his mother a letter dated the 15th of August, 1858, addressed to her from on board the *United States* frigate *Roanoke* at *Boston Navy Yard,* stating that he expected to be long absent on a voyage, but would write on his return. He never wrote again, nor did any of his family afterwards hear anything of him beyond the communications from the American officials which are next referred to. The above points were treated by both sides as established.

In 1867, after various inquiries for *N. P. Mill* had been made in vain, applications for information were made to the Government offices in *America,* the last of which was by letter, stating the substance of his last letter. Replies were received, which were to the effect that "*Nicholas Mill*" was a sergeant in the Marine Corps, had deserted on the 16th of June, 1860, while on leave from *New York* to join the *Philadelphia* station, and had not since been heard of.

In August, 1868, and subsequently, advertisements inquiring for *N. P. Mill* were inserted by his relatives in various English and American papers, but without any result.

The evidence being as above, Vice-Chancellor *James* ordered payment of the fund to the Petitioner, but suspended payment out of the fund till the 14th of November, that the Respondents might have an opportunity of appealing (1). The nephews and nieces

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(1) 1869. Aug. 2. SIR W. M. JAMES, V.C.:—

If this case had come before me untouched by authority, I should have been inclined to accede entirely to the view attributed to Lord Justice *Rolt,* who is understood to have said that the conclusion of a man's death at the end of a seven years' disappearance was matter of presumption; but that the date within that period at which he died was a question not of presumption, but of evidence.

I should have thought it not competent for this Court to have presumed that *Nicholas Phené Mill* died either at the end of the first, or at the end of the last year; and I should have either

L. J. G.
1869–70
In re
PHENÉ'S
TRUSTS.

who had survived the testator presented their Appeal Petition, asking that the order might be discharged, and the fund ordered to be paid to them.

Mr. *Bristowe,* Q.C., and Mr. *Everitt,* for the Appellants:—

The time at which *N. P. Mill* died is a matter for evidence, not for presumption: *Doe* v. *Nepean* (1); and the person who claims on the strength of death at any particular period must prove it: *Underwood* v. *Wing* (2); *In re Green's Settlement* (3). Some of the later cases have not kept these principles in view: *Lambe* v. *Orton* (4); *Dunn* v. *Snowden* (5); *Thomas* v. *Thomas* (6); *In re Benham's Trusts* (7); *In re Beasney's Trusts* (8). The decision on appeal in *In re Benham's Trusts* (9) proceeds on the principle for

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directed an inquiry, or, if further inquiry should have appeared to be useless, I should have held that the Petitioner had failed to establish his case, and that the Respondents were entitled.

But it is impossible for me to act otherwise than in conformity with two decisions of this Court, deliberately made, one by Vice-Chancellor *Kindersley* in the case of *Thomas* v. *Thomas* (2 Dr. & Sm. 298), following two previous decisions of his own, and the other by Vice-Chancellor *Malins* in *In re Benham's Trust* (Law Rep. 4 Eq. 416). If I were not to hold that *Nicholas Phené Mill* survived the testator I should be distinctly overruling both those learned Judges.

I must therefore hold that the Petitioner is entitled to this fund; but after what is said to have fallen from Lord Justice *Rolt* I certainly shall not allow the money to go out of Court until the Respondents have had an opportunity of taking the opinion of the Court of Appeal on the question.

There will be an order, then, in conformity with the prayer of the Petition; but the fund will not be paid out till the 14th of November next, in order to give the Respondents an opportunity of appealing.

(4) S.C. 1 Jur N.S. 169

(1) 5 B. & Ad. 86; 2 M. & W. 894.

(2) 4 D. M. & G. 633; 8 H. L. C. 183.

(3) Law Rep. 1 Eq. 288. 12 Jur N.S. 70

(4) 6 Jur. (N.S.) 61; 8 W. R. 111.

(5) 2 Dr. & Sm. 201.

(6) Ibid. 298.

(7) Law Rep. 4 Eq. 416.

(8) Ibid. 7 Eq. 498.

(9) L. J. *Rolt.* Dec. 6, 1867. On this case coming on by way of appeal before Lord Justice *Rolt,* 11 Eq 238, 24

Mr. *Glasse,* Q.C., and Mr. *Taylor,* appeared for the Appellants, the personal representatives of *T. Davies.*

Mr. *Roxburgh,* Q.C., and Mr. *Graham Hastings,* for the Respondents.

Before the arguments were concluded

Sir John Rolt, L.J., said that there were not sufficient facts for the Court to act upon. It was important to ascertain whether *T. Davies* was married; how old he was; and what inquiries had been made about him. This was not a case of presumption, but of proof. The Vice-Chancellor's order would, therefore, which we contend. There is no proof that the *N. Mill* who is stated to have deserted was the same person as *N. P. Mill,* nor, if he was, is it shewn that he did desert. It is most likely that he died by an accident, and was entered as a deserter merely because he did not return when his furlough had expired. This is material as to the probable time of his death: *Lakin* v. *Lakin* (1). *Dowley* v. *Winfield* (2) is a clear authority in our favour. We say, then, that the Petitioner having failed to make out his claim, the fund is divisible among the residuary legatees who are shewn to have survived the testator. *Reg.* v. *Lumley* (3) supports our case.

Mr. *Amphlett,* Q.C., and Mr. *Bagshawe,* in support of the order:—

The argument on the other side ignores the conclusion which a jury would draw from the established facts; and if it be correct, the result would be, that if *N. P. Mill* was proved to be alive and well an hour before the testator died, that would not, in the absence of further evidence, establish the title of the Petitioner. There can be no reasonable doubt of the identity of *N. P. Mill* with the *Nicholas Mill* named in the letters from the American officials. He is therefore proved to have been living seven months before the testator's death, and a jury would infer that he survived the testator. We need not contend for so strong a proposition as was laid down by Vice-Chancellor *Malins* in *In re Benham's Trusts* (4), though there is much authority in support of it; we need only contend for this, that the whole case must go to the jury. The presumption in favour of the continuance of life must weigh: *Rex* v. *Inhabitants of Harborne* (5); *Rex* v. *Inhabitants of Twyning* (6). *N. P. Mill* had not written during two years in which he is known

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be discharged, and further inquiries made.

The Order as drawn up, directed inquiries whether *T. Davies* was living or dead, and if dead, when he died? and whether he left any and what children? and also who were the next of kin of *W. Benham,* the testator, at the time of his death? and whether any of them had since died, and who were their personal representatives?

The matter was subsequently compromised, and the inquiries as to *T. Davies* were not prosecuted.

(1) 34 Beav. 443. 11 Jur Ns 5-92

(2) 14 Sim. 277.

(3) Law Rep. 1 C. C. 196.

(4) Ibid. 4 Eq. 416.

(5) 2 A. & E. 540.

(6) 2 B. & A. 386.

L. J. G.
1869–70
In re PHENÉ'S TRUSTS.

to have been alive, and he must be taken to have deserted, for it cannot be presumed that he was put down as a deserter merely because he was missing; and if he deserted, there is nothing to lead a jury to believe in his speedy death, considering the cessation of correspondence for nearly two years before the desertion. *Reg.* v. *Lumley* (1) was a criminal case, and very strict evidence that the person was living would have been necessary. The cases cited by the other side do not conflict with our view. In *Underwood* v. *Wing* (2) there was no evidence to go to a jury as to which died first. In *In re Green's Settlement* (3) a child could not be presumed to live when in the hands of the mutineers, and the remarks of the Vice-Chancellor must be read with reference to the circumstances. In *In re Beasney's Trusts* (4) there were facts tending to prove death before the particular time. The case is one where the Court will decide on the balance of evidence, not on the principle that the *onus* is thrown on one party to make out his case strictly: *Sillick* v. *Booth* (5).

Mr. *Everitt,* in reply:—

The *onus* lies on the Petitioner to prove that *N. P. Mill* survived the testator. There is no presumption in the case, but facts must be proved from which it can affirmatively be concluded that he did survive. A jury would conclude that he did not. A sergeant of marines would be a man appointed for his good character, and was not likely to desert. Moreover, a man cannot desert when on leave, so the reasonable construction of the American letters is, that he did not return at the end of his leave, and the probability is that he was dead.

1870

Jan. 14. SIR G. M. GIFFARD, L.J.:—

This is an appeal from so much of an order of Vice-Chancellor *James* as directs the residue of a fund which is standing to "The account of the share intended for *Nicholas Phené Mill,*" to be paid to his administrator.

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(1) Law Rep. 1 C. C. 196.
(2) 4 D. M. & G. 633.
(3) Law Rep. 1 Eq. 288. 12 June 1870
(4) Ibid. 7 Eq. 498.
1 June 1869 (5) 1 Y. & C. Ch. 117.

L. J. G.
1870
In re PHENÉ'S TRUSTS.

20 Eq 138

The order was made upon the hypothesis that *Nicholas Phené Mill* survived *Francis Phené*, the testator. The learned Vice-Chancellor, in making the order, stated that he did so in deference to the authority of three cases which have been decided by the Vice-Chancellor *Kindersley*, and a fourth by the Vice-Chancellor *Malins*, but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal. The testator died on the 5th of January, 1861. According to one view of the evidence *Nicholas Phené Mill* was last heard of in August, 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the Vice-Chancellor—but in deference only to the four cases referred to—as to be presumed; it will be desirable, therefore, to examine those cases, and such others as bear materially on the subject, before dealing with the evidence more particularly.

The cases decided by the Vice-Chancellor *Kindersley* were *Lambe* v. *Orton* (1); *Dunn* v. *Snowden* (2); and *Thomas* v. *Thomas* (3).

They were all decided on the same general principles, and the propositions enunciated were in substance these:—First. That the law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died. Secondly: That a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And thirdly: That the *onus* of proving death at any particular period within the seven years lies with the party alleging death at such particular period. The case decided by the Vice-Chancellor *Malins* was *In re Benham's Trusts* (4). He adopted and acted on the decisions of Vice-Chancellor *Kindersley*, but went somewhat further, laying it down that "if you cannot presume death at any particular period during the seven years, then at the end or expiration of the seven years you must presume for the first time that the person was dead, and you must also presume that within that time he is alive." *In re Benham's Trusts* was appealed, and the Lord

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(1) 6 Jur. (N.S.) 61.

(2) 2 Dr. & Sm. 201.

(3) 2 Dr. & Sm. 298.

(4) Law Rep. 4 Eq. 416, 419.

L. J. G.
1870
In re PHENÉ'S TRUSTS.

Justice *Rolt*, in November, 1867, discharged the Vice-Chancellor's order, and directed further inquiries, simply stating that there was no evidence for the Court to act upon, and that it was a case not of presumption but of proof.

In *Dowley* v. *Winfield* (1) the testator died in September, 1833. One of his two sons went abroad in September, 1830, and was heard of for the last time about twenty months previously to his father's death. The Court ordered a share of the father's residue bequeathed to him to be transferred to his brother, as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason* v. *Mason* (2) the father and son were shipwrecked together, and in argument the rules of the civil law and of the *Code Napoléon* were relied on. Sir *William Grant* said: "There are many instances in which principles of law have been adopted from the civilians by our English Courts of Justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. . . . In the present case I do not see what presumption is to be raised, and since it is impossible you should demonstrate, I think that if it were sent to an issue you must fail for want of proof." An issue was directed whether the son was living at the death of the father, but nothing appears to have come of it. In *Underwood* v. *Wing* (3), which was also a case of *commorientes*, a testator bequeathed personal estate to *J. W.* in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and *J. W.*, who claimed under the will, it was held: first, that the *onus* of proof that the husband survived his wife was upon *J. W.*; secondly, that it was necessary to produce positive evidence in order to enable the Court to pronounce in favour of the survivorship; and thirdly, that no such evidence having been produced the next of kin were entitled. *Underwood* v. *Wing* was heard before Lord *Cranworth*, Mr. Justice *Wightman*, and Mr. Baron *Martin*; and Mr. Justice *Wightman*, in the course of delivering judgment, said (4): "If there be satisfactory evidence to shew that the one survived the other, the tribunal ought so to

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(1) 14 Sim. 277.

(2) 1 Mer. 308, 312, 313.

(3) 4 D. M. & G. 633. 1 Jur. N.S. 169

(4) Ibid. 657, 658. 1 Jur. N.S. 170

L. J. G.
1870
In re PHENÉ'S TRUSTS.

decide independent of age or sex; and if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed." And he afterwards added: "We think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to shew which of them was the survivor." In *Wing* v. *Angrave* (1), another branch of the same case, the House of Lords concurred in the view which had been taken by Lord *Cranworth* and the learned Judges who sat with him. In *In re Green's Settlement* (2), Mr. *Green* was murdered in the Indian mutiny on the 3rd of June, 1857, Mrs. *Green* on the 16th of November following. Mr. and Mrs. *Green's* child escaped with its native nurse on the same 3rd of June, but was never afterwards distinctly heard of. After the lapse of seven years and upwards a Petition was presented, and the present Lord Chancellor, than Vice-Chancellor, delivered the following judgment (3): "I think the rule which the Court should follow in this case is analogous to that laid down in *Underwood* v. *Wing* (4). The whole question is, on whom is the *onus* of proof thrown? The lady, on the devolution of whose estate the question arises, is shewn to have died on the 16th of November; her husband is shewn to have died before her; a number of persons claim as her relatives, and prove their kindred within a certain degree; and, so far as now appears, there is no one nearer in kindred. On the other hand, the representative of another person claims the property also, and shews that the person through whom he claims was nearer of kin than the Petitioners, and would have been entitled if he survived his mother; but a person claiming under such a title must go further, and must shew not only that the person through whom he claims would have been entitled if he survived, but that he actually was entitled, or in other words, that he did survive. I am of opinion also, that in this case there was some evidence to go to a jury that the child died in the mother's life . . . but I do not rest my decision on this evidence. I prefer to rely on the grounds which I have before stated." There are three other cases in

(1) 8 H. L. C. 183.

(2) Law Rep. 1 Eq. 288. 12 Jur NS 70

(3) Law Rep. 1 Eq. 289. 12 Jur NS

(4) 4 D. M. & G. 633. 1 Jur NS

equity, namely, *Lakin* v. *Lakin* (1); *In re Beasney's Trusts* (2); and *In re Henderson,* referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved, not in any sense presumed.

This appears to be the state of the authorities in the Equity Courts. The leading case, however, is one at law; viz., *Doe* v. *Nepean* (3). In that case the lessor of the Plaintiff claimed as grantee in reversion of a copyhold estate on the death of *Matthew Knight. Matthew Knight* went to *America.* The last account that was heard of him was by letter, written by him from *Charleston,* and received in *England* in May, 1807. Ejectment was brought within twenty-seven years from the date he was last heard of, and within twenty from the date of the right accruing, if he was to be taken to have died at the end of the seven years from 1807. The Court of Queen's Bench was of opinion that the lessor of the Plaintiff, who gave no other evidence of *Matthew Knight's* death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience, Lord *Denman* said (4): "If for the sake of preventing inconvenience we were arbitrarily to lay down a rule that seven years' absence abroad (the party not having been heard of) was *primâ facie* evidence of his death at the end of the seven years, such a rule would in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth; and as the rule would be applicable to all cases in which the time of death became material, would in many be productive of much inconvenience and injustice." The Exchequer Chamber adopted the doctrine of the Court of Queen's Bench in these terms (5), viz.: "We adopt the doctrine of the Court of Queen's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof."

It is obvious from these passages that there is an inconsistency between that which the Courts of Queen's Bench and Exchequer Chamber laid down, and what I have quoted from the judgment of

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(1) 34 Beav. 443. 11 Jur. N.S. 522
(2) Law Rep. 7 Eq. 498.
(3) 5 B. & Ad. 86.
(4) Ibid. 96.
(5) 2 M. & W. 914.

L. J. G.
1870
In re PHENÉ'S TRUSTS.

the Vice-Chancellor *Malins*, as going beyond what was laid down by the Vice-Chancellor *Kindersley*. The Vice-Chancellor *Kindersley*, however, seems to have founded his opinion on certain portions of these two judgments; there are, therefore, other parts of them which it will be desirable to quote and examine. Thus in the judgment of the Court of Queen's Bench it is stated (1): "There is no doubt that the lessor of the Plaintiff must recover by the strength of his own title, and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before the ejectment brought; and consequently, as the presumption is that a person once alive, continues so until the contrary is shewn, the lessor of the Plaintiff was bound to prove, first, the death of *Matthew Knight;* and secondly, that it took place within twenty years before the ejectment brought:" and in the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject (2): "The Court is called on to review the decision of the Court of Queen's Bench in *Doe* v. *Nepean* (3). The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute 1 Jac. 1, c. 11, relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the fact of death, but not at the time; it is conformable also to decisions on questions of bigamy, and on policies of insurance, and it is supported and confirmed by the case of *Rex* v. *Inhabitants of Harborne* (4). It is true the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn, for which reason the *onus* of shewing the death of *Matthew Knight*

(1) 5 B. & Ad. 94.
(2) 2 M. & W. 912
(3) 5 B. & Ad. 86.
(4) 2 A. & 540.

lay in this case on the lessor of the Plaintiff. He has shewn the death, by proving the absence of *Matthew Knight*, and his not having been heard of for seven years; whence arises at the end of those seven years another presumption of law, viz., that he is not then alive; but the *onus* is also cast on the lessor of the Plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of *Matthew Knight*. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time during which he was not heard of has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems therefore to lead to the conclusion that the death took place some considerable time before the expiration of the seven years." The Vice-Chancellor *Kindersley* appears to have acted on the passages in both these judgments, which are to the effect that the *onus* of proving the death of *Matthew Knight* lay on the Plaintiff, because the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not and ought not to be any such presumption of law; if there was such a presumption it would be no ground for throwing the *onus* of proof on the Plaintiffs, where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of death, as suggested and laid down by the Vice-Chancellor *Malins*, to the end of the seven years; but both

L. J. G.
1870
In re PHENÉ'S TRUSTS.

the decisions are that it did not, and because it did not the Plaintiff failed, and did not recover the property he sought. In the recent case of *Reg.* v. *Lumley* (1), it was held, consistently with another judgment delivered by Lord *Denman* in *Rex* v. *Inhabitants of Harborne* (2), that there was no presumption of law in favour of the continuance of a life up to a particular period, but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Mr. Justice *Byles*, Mr. Justice *Lush*, Mr. Justice *Brett*, and Baron *Cleasby;* and Mr. Justice *Lush* delivered the judgment of the Court in these terms (3): "We are of opinion that the direction to the jury in this case, viz., 'that there being no circumstances leading to any reasonable inference that he had died, *Victor* must be presumed to have been living at the date of the second marriage,' was erroneous. In an indictment for bigamy it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex* v. *Inhabitants of Twyning* (4), *Rex* v. *Inhabitants of Harborne*, and *Doe* v. *Nepean* (5), appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act 24 & 25 Vict. c. 100, s. 57, then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead, but the proviso affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That, as we have said, is always a question of fact."

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(1) Law Rep. 1 C. C. 196.
(2) 2 A. & E. 540.
(3) Law Rep. 1 C. C. 198.
(4) 2 B. & A. 386.
(5) 5 B. & Ad. 86; 2 M. & W. 894.

True it is that *Reg.* v. *Lumley* (1) was a criminal case, and that the seven years had not elapsed from the date of the first husband having been last heard of; but though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property, each have to prove their case, and in each instance the object is to arrive at and act on the real truth. Lord *Denman*, who delivered both judgments in *Doe* v. *Nepean* (2), thus expressed himself in *Rex* v. *Inhabitants of Harborne* (3): "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law . . . I am aware that Mr. Justice *Bayley* founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are: What evidence is admissible, and what inference may fairly be drawn from it?" Other learned Judges concurred in this opinion. The notion of a legal presumption in favour of life originated, I believe, with the civil law; and we have Sir *William Grant's* opinion in *Mason* v. *Mason* (4) as to adopting presumptions of fact from that law.

It is a general, well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe* v. *Nepean*, and to assert as an exception to the rule that the *onus* of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *In re Green's Settlement* (1), or with the *dictum* of Lord Justice *Rolt* when he said, in *In re Benham's Trusts*, that the question was one, not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of the reasoning, in *Doe* v. *Nepean* (2), or with the judgments in *Rex* v. *Inhabitants of Harborne* (3), and *Reg.* v. *Lumley* (4), or with the principles to be deduced from the judgment in *Underwood* v. *Wing* (5). The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

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(1) Law Rep. 1 C. C. 196.
(2) 5 B. & Ad. 86; 2 M. & W. 894.
(3) 2 A. & E. 540, 544.
(4) 1 Mer. 308.

This case happens to be one of an alleged member of a class of legatees. Survivorship of a testator is requisite to clothe a person with the character of a member of that class. This is a tacit condition annexed by law to the gift, and it follows that the representatives of a person alleged to be a member of the class must prove as against the other members of the class who prove their survivorship, that he survived the testator, otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities, and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which *Nicholas Phené Mill* died, that it is a matter of fact to be proved by evidence, and that the *onus* of proof rests on his representative.

This brings me to an examination of the evidence. At the hearing a further inquiry as to the facts was offered, and declined by each of the parties; it was not admitted by the Appellants that *Nicholas Phené Mill* was the *Nicholas Mill* referred to in the communications from the American officials, but these communications were not objected to, and were read and commented on by both sides. There are three affidavits. The earliest in point of date is that of *Nicholas Phené Mill's* mother. She states that she is the widow of *William Mill* the elder; that she left *England* many

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(1) Law Rep. 1 Eq. 288. 12 Jur N.S. 70
(2) 5 B. & Ad. 86; 2 M. & W. 894.
(3) 2 A. & E. 540.
(4) Law Rep. 1 C. C. 196.
(5) 4 D. M. & G. 633; 8 H. L. C. 183. 1 Jur N.S. [illegible]

L. J. G.
1870
In re PHENÉ'S TRUSTS.

years ago to reside abroad; that *Nicholas Phené Mill* was born at *Ostend* in the year 1829; that on the 19th of August, 1853, he left home, and went to reside in *America;* that he wrote letters to her and her family from *America;* that she received from him a letter addressed from on board the *United States* frigate *Roanoke,* dated the 15th of August, 1858; that neither she, nor, as she believes, any member of the family, has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him.

The next affidavit is that of the Petitioner in the Court below. He is a brother of *Nicholas Phené Mill.* He speaks of his brothers and sisters, and says that the last that has or can be ascertained or heard about *Nicholas Phené Mill* is, that being a sergeant of marines in the *United States* naval service, and unmarried, he deserted from the *Roanoke, United States* frigate, on the 16th of June, 1860. He further says that he was himself in *America* from August, 1853, till April, 1862, speaks of many fruitless inquiries and advertisements, and adds that his information as to *Nicholas Phené Mill's* desertion was derived from an official letter written in answer to one from his solicitors to the government authorities in *America.*

The last affidavit is that of the clerk to the Petitioner's solicitors. He speaks of letters of administration being granted to the Petitioner, and proves the correspondence with the government officials in *America.* There were two letters from the Petitioner's solicitors: each was answered. The answer to the second was the most explicit, and the only one necessary to refer to; it is indorsed on the letter to which it is an answer, and is in these terms:—

"Navy Department.
"Bu. Equipment and Recruiting,
"*Washington,* Dec. 11, 1867.

"*Nicholas Mill* was a sergeant in the Marine Corps, and deserted June 16th, 1860, while on leave from *New York* to join the *Philadelphia* station. He has not been heard of from since that date.

"*M. Smith,* Chief of Bureau."

This was an answer to a letter which stated that *Nicholas Phené Mill* wrote to his mother on the 15th of August, 1858, from on board the *United States* frigate *Roanoke, Boston Navy Yard, Massa-*

L. J. G.
1870
In re PHENÉ'S TRUSTS.

chusetts, stating he expected to be long absent, but would write on his return from his voyage.

If this correspondence is excluded, there is no other evidence than that *Nicholas Phené Mill* was last heard of in 1858; there would, therefore, be no sufficient evidence of his having survived the testator; nor does the admission of the correspondence supply the necessary proof; for though I assume that the *Nicholas Mill* was the *Nicholas Phené Mill* who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on the 16th of June, 1860, that he was alive when the testator died in January, 1861. I should not do so if it was a simple statement of desertion, and no more; but the statement is not simply that he deserted, but that he deserted while on leave from *New York* to join the *Philadelphia* station, June 16th, 1860, and has not been heard of from since that date, the reasonable conclusion from which is, that he never reappeared after he went on leave, that his leave was up on or before the 16th of June, 1860, and that so his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that in my opinion the burden of proof is on the representative of *Nicholas Phené Mill,* and that *Nicholas Phené Mill's* representative has not proved affirmatively that *Nicholas Phené Mill* survived the testator—a proof which I consider essential to his title.

The order must be discharged, and an order made as prayed by the Petition of Appeal; but the costs below and here must come out of the share.

Solicitors: Mr. *A. E. Briant;* Messrs. *Fielder & Sumner;* Mr. *Geaussent;* Mr. *M. Pope.*

LEE *v.* HALEY.

L. J. G.
1869
Dec. 18.

7 Ch 822
14 Eq 549
8 Ch 94
17 Eq 324
5 Ch D 35
13 Ch D 51
576
17 Ch D 64
187
Ch D

Injunction—Colourable Variation—Assumption of Name of Firm—Misconduct of Plaintiff seeking Injunction—Delay.

The Plaintiffs had carried on for some years at No. 22, *Pall Mall*, under the style of "*The Guinea Coal Company*," a large business, which had a considerable reputation. In March, 1869, the Defendant, who had been their manager, set up a rival business in *Beaufort Buildings, Strand*, under the name of "*The Pall Mall Guinea Coal Company*," and at the end of August removed it to No. 46, *Pall Mall*. On the 24th of November, the Plaintiffs, finding that many persons had been misled into giving orders to the Defendant in the belief that his concern was that of the Plaintiffs, filed their bill to restrain him from trading under the above style, or any other colourable imitation of the Plaintiffs' business style. The Defendant, among other grounds of defence, alleged that the Plaintiffs had knowingly and habitually sold short weight, and that they had no exclusive right to the name "*Guinea Coal Company*," which was used by various other establishments about *London*. Vice-Chancellor *Malins* granted an injunction restraining the Defendant from using the name "*The Pall Mall Guinea Coal Company*" in *Pall Mall*. On appeal motion by the Defendant:—

Held, that although the Plaintiffs had no exclusive right to the name, the injunction had been properly granted, on the ground that the Defendant had no right to use the name in such a way as to lead persons to believe that his business was that of the Plaintiffs, and that therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used:—

Held, that there had been no such delay as to take away the Plaintiffs' right to an injunction on interlocutory application; for that in such cases a Plaintiff is not bound to come to the Court until he has had time to obtain evidence that persons have been actually misled by the acts complained of, and that the delay, even if unexplained, would not have been fatal to the Plaintiffs' case, as the injunction asked for was of such a nature that the Defendant could not be injured by the delay in asking for it:—

Held, that if it had been proved that the Plaintiffs intentionally and habitually sold short weight the Court would have refused their application for an injunction.

THIS was an appeal by the Defendant from an interlocutory order of Vice-Chancellor *Malins*, restraining him from continuing to use, and from exhibiting or using, the name "*The Pall Mall Guinea Coal Company*," in *Pall Mall*, or any other name or style so framed as to be a colourable imitation of the name or style in which the Plaintiffs' branch business mentioned in the bill was carried on, or as to deceive the public, or lead to the belief that the business carried on by the Defendant was the same as the business carried on by the Plaintiffs under the name or style of "*The Guinea Coal Company,*" or was in any way connected therewith.

The Plaintiffs, who were carrying on an extensive business as coal merchants, commenced, in October, 1858, a branch business under the style of "*The Guinea Coal Company,*" for supplying coal at the uniform rate of a guinea a ton throughout the year. They first carried on this branch business at *Exeter Street, Strand,* then at *Wellington Buildings, Strand,* and in 1863 removed it to No. 22, *Pall Mall,* where it had been carried on ever since. The business was an extensive one, and the style was well known by the public. It appeared from the evidence that the Plaintiffs were the first to use the style of the "*The Guinea Coal Company,*" but that various more recent establishments with similar names had for some years existed about *London,* two being called "*The Guinea Coal Company,*" without addition, and the others having the same name with some addition, as *e.g.,* "*The London Guinea Coal Company.*" Of all these establishments the nearest to the Plaintiffs' establishment were the two which used precisely the same name as the Plaintiffs, one of them being at *King's Cross,* and the other having offices at *Notting Hill* and at *Albert Gate, Knightsbridge.*

The Defendant had been the manager of this branch business of the Plaintiffs from December, 1860, till January, 1869. On Monday, the 18th of that month, he suddenly wrote to the Plaintiffs that he should leave their service on Wednesday, as soon as the ledgers had been checked, and he accordingly did so.

In March the Plaintiffs discovered that the Defendant was carrying on business at No. 11, *Beaufort Buildings, Strand,* under the style of "*The Pall Mall Guinea Coal Company.*"

At the latter end of August the Defendant removed his business to No. 46, *Pall Mall.* The Plaintiffs had been in the habit of soliciting custom by sending round prospectuses accompanied by an envelope of thin paper directed to "*The Guinea Coal Company, 22, Pall Mall,*" with a blank form of order for coal inclosed. The Defendant, on removing to *Pall Mall,* circulated extensively, among the Plaintiffs' customers and others, prospectuses with envelopes and blank forms of order, the envelopes and forms of order being

L. J. G.
1869
Lee
v.
Haley.

not very dissimilar from those of the Plaintiffs. The envelopes had printed upon them

"*The Pall Mall Guinea Coal Company,*
"11, *Beaufort Buildings, Strand,*"

but over the second line was pasted a strip of paper having printed upon it in red letters "Removed to 46, *Pall Mall,*" so as to hide nearly the whole of the "11, *Beaufort Buildings, Strand.*"

The Plaintiffs became aware on the 30th of August that the Defendant had begun to carry on business in *Pall Mall* under the above style, but did not communicate with him on the subject. As the season advanced it was found that many persons were misled by the similarity of style, and on the 24th of November the Plaintiffs filed their bill for an injunction. It was alleged in the bill that the Defendant had fitted up his office in *Pall Mall* in a style so similar to that of the Plaintiffs' office as to be calculated to cause mistakes, but this was not substantiated. Nearly twenty cases, however, of persons actually mistaking the Defendant's concern for that of the Plaintiffs were proved; some being cases of servants sent with orders to the Plaintiffs who had given them at the Defendant's office, and others being cases of regular customers of the Plaintiffs, who, having received the Defendant's envelopes and forms of order, had filled up the form of order, put it into the envelope, and posted it, in the belief that they were giving orders to the Plaintiffs.

The Defendant, by his affidavits in answer, set up the case that the Plaintiffs had habitually and intentionally sold short weight, and that although their prospectuses announced that they supplied "their *Wallsend* coal" at a guinea per ton, the coal which they supplied was not *Wallsend* coal, but either *Wallsend* mixed with inferior coal, or coal of a description inferior to *Wallsend.* He also relied on the Plaintiffs' delay.

The Plaintiffs, in reply, adduced evidence to shew that they had taken every possible precaution to insure the delivery of full weight, and that very few complaints had been made of short weight, though, owing to the dishonesty of carmen, some of whom had been convicted for stealing coal, it occasionally happened that short weight was delivered. As regarded the quality of the coal, one of the Plaintiffs deposed thus: "The Plaintiffs never professed

L. J. G.
1869
Lee
v.
Haley.

to sell genuine *Wallsend* coals as the *Guinea Coal Company.* The *Wallsend* coal referred to in their circular is a description of coal known in the trade by the usual term of *Wallsend.*"

Vice-Chancellor *Malins* having granted an injunction in the terms above mentioned (which were the terms of the 1st paragraph of the prayer of the bill, except that the words "in *Pall Mall,*" which did not occur in the prayer, were inserted by the Vice-Chancellor, His Honour being of opinion that the injunction ought not to prohibit the use of the name generally), the Defendant now moved by way of appeal from this order. (14 R (1849) 258)

Mr. *Glasse,* Q.C., and Mr. *Nalder,* for the appeal motion:—

The name of the *Guinea Coal Company* is common to every one who chooses to use it. The Plaintiffs have no exclusive right to it; still less to the name of the *Pall Mall Guinea Coal Company,* which they have never themselves used: *Hogg* v. *Kirby* (1). An injunction against using a name in a particular place is unprecedented. If a man has a right to use a name, he may use it anywhere. The Plaintiffs have by misrepresentation and misconduct disentitled themselves to any relief they might otherwise have claimed: *Leather Cloth Company* v. *American Leather Cloth Company* (2); *Perry* v. *Truefitt* (3); *Pidding* v. *How* (4). The delay of three months is fatal to the Plaintiffs' case.

Mr. *Morgan,* Q.C., and Mr. *Cadman Jones,* for the Plaintiffs, were not called upon.

Sir G. M. Giffard, L.J.:—

Apart from the question whether the Plaintiffs have stated any case entitling them to relief, three grounds of defence have been raised: first, that the Plaintiffs intentionally and systematically sold short weight; secondly, that they professed to sell *Wallsend* coal, but in fact sold something which was not *Wallsend* coal at all; and thirdly, that they have been guilty of delay.

Now as to the short weight, if the Plaintiffs had been systematically and knowingly carrying on a fraudulent trade, and delivering short weight, it is beyond all question that this Court would not interfere to protect them in carrying on such trade; but there is no evidence that proves anything of the sort. The evidence amounts to this, and nothing more, that in some instances short weight has been delivered; but we have proof from the persons employed to look after the weighing machines of the Plaintiffs, and to keep them in order, who look at them every six weeks, that the weights were correct; and we have proof of the most careful directions being given to the servants to secure the delivery of full weight. It may have happened that owing to the carelessness or dishonesty of some of those servants, short weight has in some instances been delivered; but it does not follow that the Plaintiffs are carrying on a fraudulent trade, and, in fact, the evidence clearly shews that they are not. It is quite clear that they have never knowingly delivered short weight; it is quite clear that they have used all the precautions that tradesmen can be expected to use in cases of this description; and I must say that this defence is most unjustifiable, and is not creditable to the Defendant.

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(1) 8 Ves. 215.
(2) 11 H. L. C. 523. 11 Jur NS 573.
(3) 6 Beav. 66.
(4) 8 Sim. 477.

I will take next the defence that the Plaintiffs untruly professed to sell *Wallsend* coal. There again, if the Plaintiffs had advertised their coal as *Wallsend* coal, and what they sold had not been anything known in the trade as *Wallsend* coal, this Court would have refused to interfere on behalf of persons carrying on such a business. But what I find in the evidence is this; first of all, there is the circular stating that they secure to their customers "their *Wallsend* coal" (though I lay no stress upon the word "their"), and then there is this uncontradicted statement in Mr. *Jerdein's* affidavit: "The Plaintiffs never professed to sell genuine *Wallsend* coals as the *Guinea Coal Company*, the *Wallsend* coal referred to in the said circular is a description of coal known in the trade by the usual term of *Wallsend*." If the Plaintiffs have supplied a description of coal known in the trade by the usual term of *Wallsend*, which is not contradicted, there is nothing false in their stating that they secured to their customers their *Wallsend* coal. That makes an end of those two defences.

Then we come to the question of delay. The Defendant first set up in *Beaufort Buildings* in March last, under the name of "*The*

L. J. G.
1869
LEE
v.
HALEY.

Pall Mall Guinea Coal Company." His setting up under that name in that locality does not seem calculated to interfere, and so far as appears, did not interfere with the Plaintiffs; and therefore, in my opinion, the time until he removed to *Pall Mall* in the month of August was not material. The case of delay then reduces itself to this, that the Defendant, to the knowledge of the Plaintiffs, was carrying on business in *Pall Mall* under the name of "*The Pall Mall Guinea Coal Company*" by the end of August, and that they did not file their bill till the 24th of November. But in dealing with the question of delay, each case must necessarily depend upon its own circumstances. The first thing to be observed in cases of this description is, that it would not be safe for any Plaintiff to come into Court until he could prove instances of persons having been actually deceived, for the Court would have to try a hypothetical case, and a number of people would be brought forward by the Defendant to say, and probably truly, that the thing done would never have deceived them, and in their opinion was not calculated to deceive. I think, therefore, that the Plaintiffs were quite justified in waiting until they could collect a sufficient number of cases to prove to the Court that the proceedings complained of actually do deceive the public. Then, further, in cases of delay, we must consider whether the nature of the injunction is such that if it is granted the Defendant will have been injured by the delay. It has been strongly urged here that if this injunction is sustained the Defendant's trade will be stopped, but that is not so; his trade will not be stopped in the least, he will only be restrained from selling under this particular name. He may sell in *Pall Mall* coals at a guinea per ton to his heart's content; the only thing he may not do is to use a name which is calculated to induce customers to come to him under the supposition that they are going to the Plaintiffs. I think, therefore, in the first place, that there has not been any delay which is not sufficiently accounted for, because the Plaintiffs were justified in waiting till they could bring forward cases of actual deception; and, in the second place, that, considering the nature of the injunction, such an amount of delay as has taken place here would, even if unaccounted for, be immaterial.

We come then to the merits of the case apart from these special defences. The facts are very simple, and the case depends upon principles which are well known, which this Court has asserted again and again, and which I trust it always will assert. The case is that the Plaintiffs have carried on business in *Pall Mall* for a series of years under the name of "*The Guinea Coal Company*," and there is evidence to shew that they were well known, and that, as one would expect, they were frequently spoken of, as "*The Pall Mall Guinea Coal Company*." The Defendant, first of all, sets up as "*The Pall Mall Guinea Coal Company*" in *Beaufort Buildings*. That was not found, and, indeed, was not calculated, to induce persons to deal with him under the supposition that they were dealing with the Plaintiffs. All persons, of course, going to *Beaufort Buildings* would know perfectly well that they were not dealing with the persons carrying on their business in *Pall Mall*. He then proceeds to set up under the same name in *Pall Mall*, and that is the proceeding which is now complained of. It was urged on behalf of the Defendant that there are a number of other companies who call themselves *Guinea Coal Companies*, some with prefixes, and others with no prefixes, and that for this, among other reasons, the Plaintiffs cannot have any property in the name of the *Guinea Coal Company*. I quite agree that they have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. The other persons who use the name of "*The Guinea Coal Company*" carry on business in such situations that they are not likely to be mistaken for the Plaintiffs, but as regards the use of it by the Defendant there is abundant evidence shewing that many persons have been deceived, and when we see exactly what the Defendant did, I must emphatically say that I do not acquit him of an intention to deceive. What he does is this: he goes first of all to *Beaufort Buildings* and adopts the name of "*The Pall Mall Guinea Coal Company*." When he removes from *Beaufort Buildings* to *Pall Mall* the circular which he sends to the customers

L. J. G.
1869
LEE
v.
HALEY.

of the old firm is headed: "*The Pall Mall Guinea Coal Company,*" and upon a strip of paper pasted over the original address, so that it cannot be seen where the original place was, are the words, "removed to 46, *Pall Mall.*" I say that this was calculated, and I believe intended, to induce persons to believe that the business which the Defendant carried on was the Plaintiffs' business, removed from one part of *Pall Mall* to another.

For these reasons I am clearly of opinion that this injunction was properly granted, and there is no objection to it upon the ground that it is confined to the particular street of *Pall Mall;* it is quite right that it should be so confined, because in all probability if the same name were used in some other street it would lead to no mistake or deception. I think this injunction has been properly granted upon the well known principles of this Court, which are applicable to all cases of this description, viz., that it is a fraud on the part of a Defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person. That being so, this application must be dismissed with costs. If the Defendant chooses to have an undertaking as to damages he can, but it will make no difference as to the costs, for I understand that it was not asked for in the Court below.

Solicitors for the Plaintiffs: Messrs. *Jones & Starling.*
Solicitor for the Defendant: Mr. *H. B. Clarke.*

STAIGHT *v.* BURN.

L. J. G.
1869
Dec. 22.

Light and Air—Alteration of Easement—Diminution of Light by Plaintiff—Relief in Equity.

Where ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light will not in itself preclude him from obtaining an injunction against the person causing the obstruction.

The Defendant built a wall to the north of the windows of the Plaintiff's house, by which his ancient lights were interfered with. The Plaintiff was at the same time enlarging his own premises, whereby he diminished the light coming to his own windows by shutting off some of the light from the south and south-west:—

Held (reversing the decision of *Stuart*, V.C.), that the Plaintiff was entitled to an injunction.

The doctrine of *Tapling* v. *Jones* (1) *held* to apply to the equitable as well as to the legal remedy.

Heath v. *Bucknall* (2) observed upon.

See as to this case Aynsley v Glover LR 10 Ch 284.

9 Eq 440-
6 Ch D
9 Ch 21
18 Eq 5
10 Ch 2
6 Ch D
6 Ch D 7
14 Ch D
217-9

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, who refused to make any order on a motion for an injunction by the Plaintiffs in the above suit under the following circumstances:—

The Plaintiffs, Messrs. *Daniel* and *Stephen Staight*, had for some time carried on the business of ivory and hard wood cutters at No. 35, *Charles Street, Hatton Garden*. Their premises were on the north side of *Charles Street*, which runs east and west. The Plaintiffs had also recently purchased the adjoining houses, Nos. 40 and 41, in *Kirby Street*, which runs north and south at right angles to *Charles Street*, on the east of No. 35, so that the two houses in *Kirby Street*, of which No. 41 was nearest to *Charles Street*, look out on the rear over the back yard of No. 35, *Charles Street*. The Plaintiffs, being desirous of enlarging their premises, were engaged in rebuilding No. 35, *Charles Street*, as well as Nos. 40 & 41, *Kirby Street*, but in doing so they left the west wall of No. 40 standing in order to preserve the ancient windows in that wall.

The Defendants are bookbinders, carrying on business in *Kirby Street*. They had recently purchased No. 39 in that street, being the house adjoining No. 40 on the north, and were now engaged in building a blank wall, dividing their back yard from the back yard of No 40. This wall projected from the west wall of No. 39, at right angles to it, for about twelve feet, and was within three feet of the ancient windows in the west wall of No. 40. It had already been built to the height of thirty feet, and the Defendants intended to raise it to the height of fifty feet. Their alleged reason for building the wall was to protect them from the danger of fire on the Plaintiffs' premises.

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(1) 11 H. L. C. 290.
11 Jur NS 309

(2) Law Rep. 8 Eq. 1.

The Plaintiffs filed the present bill, complaining that the new wall materially interfered with the light coming to the west windows of No. 40, and prayed for an injunction to restrain the Defendants from proceeding with the building of the wall, and also for a mandatory injunction to compel them to pull down what they had already built. They subsequently moved for an injunction in terms of the prayer. The Plaintiffs filed affidavits to prove that the diminution of light would be considerable, and that light coming from the north, being more diffused than light from any other quarter, was very important to them with regard to the nature of their business, which involved operations of a very delicate description.

The Defendants resisted the motion, in the first place, on the ground that the diminution of light was very inconsiderable; secondly, on the ground that the alterations of the Plaintiffs themselves, who were rebuilding their premises to the south of the windows in question on a more lofty and extensive scale than the old ones, would shut out a great deal of the light from the south and south-west which formerly came to their windows; and, lastly, that the suit was mainly intended for the protection of the new lights which the Plaintiffs had opened. The Vice-Chancellor, considering that the Plaintiffs had, by their own conduct, qualified their ancient right to light, refused to make any order on the motion, and the Plaintiffs now renewed it before the Court of Appeal.

Mr. *Dickinson*, Q.C., and Mr. *G. W. Collins*, for the Plaintiffs:—

The evidence shews that the abstraction of light by the building of the Defendants' wall is a material injury to them, although the actual diminution may not be very great, because a north light is important to persons exercising their trade of workers in ivory. The Plaintiffs therefore have a right to protection: *Clarke* v. *Clark* (1); *Yates* v. *Jack* (2); *Dent* v. *Auction Mart Company* (3); *Martin* v. *Headon* (4); *Beadel* v. *Perry* (5). The objection that the Plaintiffs have themselves altered their easement by opening new lights and obstructing some of the light by their own building is satisfactorily met by *Tapling* v. *Jones* (6), where it was held that the alteration of ancient windows did not disentitle the Plaintiff to maintain an action against a person obstructing them.

Mr. *Greene*, Q.C., and Mr. *Hemming*, for the Defendants:—

The effect of the building of the wall will not be to darken the Plaintiffs' windows. Nearly all the light which formerly came to them came from the south and south-west. If any effect is produced it will probably increase the light by reflecting the southern rays.

The real injury has been caused by the Plaintiffs themselves; and considering their conduct in opening new lights, whatever right of action they may have at law, they are precluded from obtaining relief in equity. *Heath* v. *Bucknall* (7) is conclusive on that point.

Mr. *G. W. Collins*, in reply.

SIR G. M. GIFFARD, L.J.:—

This case appears to me a very simple one. If we assume for a moment that the Plaintiffs were not going to alter their own premises in the slightest degree, could there be any reasonable doubt but there would be an obstruction to these windows? I put out of question the lower windows. It is sufficient for this purpose to take the two upper windows. Those two windows had to the north a very wide unobstructed area, and what the Defendants have done is to put within three feet of these windows a wall nearly fifty feet high, which extends in front of these windows nearly eleven feet. Whatever the scientific evidence may be, it is absurd to say that this will not materially affect the access of light to these windows.

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(1) Law Rep. 1 Ch. 16. 11 Jur NS 914

(2) Ibid. 295. 12 Jur NS 305

(3) Ibid. 2 Eq. 238. 12 Jur NS 447

(4) Law Rep. 2 Eq. 425. 12 Jur NS [illegible]

(5) Ibid. 3 Eq. 465.

(6) 11 H. L. C. 290. 11 Jur NS 309

(7) Law Rep. 8 Eq. 1.

L. J. G.
1869
Straight
v.
Burn.

It has been suggested that if the wall is allowed to stand, although there will not be the same direct light, there will be a great amount of reflected light. The answer to that is, that the Plaintiffs are entitled to have a light of the same nature as they have had. They are not bound to put up with reflected light, and it may be, and I have no doubt would be in this particular trade, a serious disadvantage to them if they were obliged to put up with that reflected light. They certainly could not use these rooms for the purposes for which they could use them if the light were direct.

The next question in the case arises out of what the Plaintiffs are themselves doing, or about to do. Now I propose to preface the order which I shall make with these words:—"The Plaintiffs representing that they will either retain or restore the ancient windows referred to in the Plaintiffs' bill, and giving the usual undertaking as to damages." There will then be an order for an injunction to restrain any further proceeding with the wall. I should not have hesitated in this case to grant a mandatory injunction if at this moment the Plaintiffs had actually been carrying on their business in these rooms, because it is obvious that this wall is not part of a permanent building, but a mere temporary wall, run up apparently for the purpose of trying the right. But it is quite obvious that the Plaintiffs can bring their cause to a hearing before they actually commence carrying on this business in these rooms.

Is, then, that thing which the Plaintiffs are about to do, a reason why they should not have this injunction? I have already said that I consider it clear to demonstration, that if things had been left in their original state, the Plaintiffs would have been entitled to an injunction, and that being so, I cannot see what difficulty there is. The evidence distinctly is, that they mean either to retain or to restore these very windows.

That leaves only the other part of the case which has been argued, namely, the authority of *Heath* v. *Bucknall* (1). With respect to that case, I cannot take it as having been decided otherwise than upon its particular circumstances; those particular circumstances, as I gather them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material

(1) Law Rep. 8 Eq. 1.

L. J. G.
1869
STRAIGHT
v.
BURN.

18 Eq 547

damages at law. But if this case is supposed to lay down the proposition that a Plaintiff who, according to *Tapling* v. *Jones* (1), has clear legal rights, cannot come to this Court and get protection for those rights, I entirely demur to such a conclusion. If, for instance, there is a house with three ancient windows, and it is desirable to add at no great distance from those three ancient windows, two other windows, is it to be said that because those two other windows are to be placed in that position, the Plaintiff is not to come into Court to preserve what has been decided in *Tapling* v. *Jones* to be his clear legal right? Such a conclusion would not be either according to principle or to the course of this Court. I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this Court will interfere by injunction. That being so, I think this injunction must be granted in the form which I have stated.

Solicitors for the Plaintiffs: Messrs. *Monckton & Monckton.*
Solicitors for the Defendants: Messrs. *Hopwood & Sons.*

In re BARNED'S BANKING COMPANY.

COUPLAND'S CLAIM.

L. J. G.
1869
Dec. 2.

6 Ch 391,
5 HL 185, -
19 Eq 70,
13 ,
1 Ch 197

Winding-up—Proof by secured Creditor—Letter of Credit.

C. being instructed to purchase cotton for *D.*, the *B.* company, at *D.*'s request, gave *C.* a letter of credit authorizing him to draw upon them to a certain amount, the bills to be accompanied by bills of lading for cotton, to be delivered up to the company on their accepting the bills. Bills were accordingly drawn, and were accepted by the company; but before they came to maturity the company stopped payment, and was afterwards ordered to be wound up. *C.* sent in a claim under the winding-up, and afterwards received the proceeds of the sale of the cotton:—

Held, that *Kellock's Case* (2) did not apply, for that under the terms of the letter of credit the bills of lading were to be a security to the company, and that *C.* could only stand as a creditor for the balance.

THIS was a motion by way of appeal from a decision of the Master of the Rolls (3).

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(1) 11 H. L. C. 290. (2) Law Rep. 3 Ch. 769. (3) Law Rep. 8 Eq. 472.

11 Jur NS 309

In November, 1865, *Daunt & Co.* instructed the Appellants, Messrs. *Coupland*, to purchase cotton on their account, and transmitted to them the following letter of credit issued by the banking company, and dated the 17th of November, 1865, and addressed to the Appellants:—

"At the request of Messrs. *W. H. Daunt* of this town, we have this day opened a credit in your favour for £23,150, and you are therefore authorized to value on our firm in such draft or drafts as may be convenient to you, not exceeding in the whole the said sum of £23,150, to be drawn at six months' sight, accompanied by corresponding bills of lading for cotton to be given up to us on our acceptance of the drafts, and the drafts to be duly advised to us by next mail. And we hereby engage to accept such drafts on receipt of the bills of lading, and to pay them at maturity."

Coupland & Co. accordingly purchased cotton for *Daunt & Co.*, and drew bills, which were accepted by the bank, but had not reached maturity when the bank stopped payment. The bills of lading were given to the bank when the bills were accepted.

In March, 1866, Mr. *Wilson* of *Liverpool* instructed Messrs. *Coupland* to buy cotton, and transmitted the following letter of credit addressed to Messrs. *Coupland*, and issued by the bank:—

"At the request, and on the account of Mr. *M. J. Wilson*, we have this day opened a credit in your favour for £50,000, and you are hereby authorized to value on this bank in such sum or sums as may be convenient to you, not exceeding in the whole the said sum of £50,000, in drafts at six months' sight, against cotton purchased in conformity with the letter of instructions from Mr. *M. J. Wilson* of this date, such drafts to be covered by shipping documents—say, invoices and bills of lading of cotton addressed to this company, and forwarded under separate cover by the same mail which brings the draft for acceptance, on the receipt of which documents we engage to honour such drafts to the extent named, if in the hands of *bonâ fide* holders."

Coupland & Co. accordingly purchased cotton for *Wilson*, and drew bills under this letter of credit. They were presented for acceptance with the bills of lading annexed; but as the bank had stopped payment, they were not accepted.

An order having been made for winding up the company, *Coup-*

L. J. G.
1869
In re Barned's Banking Co.
Coupland's Claim.

land & Co., in June, 1866, sent in their claim for the amount of the bills. At this time the cotton was unsold, and the bills were in the hands of third parties. After this *Coupland & Co.* took up the bills, and received the amount produced by sale of the cotton, and the question was, whether they were entitled to stand as creditors for the whole amount of the bills, or only for that amount after deducting the proceeds of the sale. The Master of the Rolls held that, as they were not holders of the bills when the claim was made, they could only prove for the balance.

Mr. *Jessel*, Q.C., and Mr. *Westlake*, for the appeal motion, relied on *Kellock's Case* (1).

Sir *R. Baggallay*, Q.C., and Mr. *Kekewich*, *contrà*, were not called upon.

Sir G. M. Giffard, L.J. :—

This case is quite distinct from *Kellock's Case*. That was a case where the company had no interest in the mortgaged property but as mortgagors. Here the company were, in fact, mortgagees. Take the first letter of credit; it is a letter of credit authorizing bills to be drawn; but the bills were to be accompanied by bills of lading, which were to be given to the banking company on their accepting the bills. The second letter of credit is similar, and I see no substantial difference between the one and the other. The bills of lading were to be handed to the company, which can only have been for the purpose of giving them a security; and being entitled to the benefit of that security, they can only be liable for the difference between the amount of the bills and the proceeds of the security. The appeal motion must be refused with costs.

Solicitors: Messrs. *Elmslie, Forsyth, & Sedgwick;* Messrs. *Freshfield.*

(1) Law Rep. 3 Ch. 769.

L. J. G.
1869
Dec. 2.

16 Eq 95

In re TRICK'S TRUSTS. *Ex parte* WILLOBY.

Trustee Relief Act—Jurisdiction—Costs.

Where a particular fund is paid into Court under the Act for the relief of trustees, by an executor who has the general residue in his hands, the Court has jurisdiction to order the costs of a petition relating to the particular fund to be paid out of the general residue.

Order of *Stuart*, V.C., affirmed, with a variation.

THIS was an appeal motion to vary an order of Vice-Chancellor *Stuart.*

By the will of *Thomas Trick* certain funds were bequeathed to Mrs. *Willoby,* his executrix, upon certain trusts for the benefit of four infant grandchildren of the testator. After various other bequests the testator gave his residuary personal estate to Mrs. *Willoby.* All his property was made subject, by his will, to certain life annuities, and a question arose upon the peculiar wording of the will, whether the income of the infants' funds was not applicable to the payment of these annuities in exoneration of the rest of the testator's property. Mrs. *Willoby* paid the fund in which the infants were interested into Court under the *Trustee Relief Act,* and on the 25th of November, 1868, an order was made appointing a guardian, and directing an account of Mrs. *Willoby's* receipts and payments on behalf of the infants. The Chief Clerk having made his certificate, cross summonses were taken out to vary it, and were adjourned into Court, and the Vice-Chancellor, on the 23rd of July, 1869, made the order under appeal, which decided against Mrs. *Willoby's* claim to have the annuities thrown primarily on the income of the infants' fund, and gave consequential directions as to the payments to be made by Mrs. *Willoby* according to this view, and went on to order " That the costs of all parties of and relating to the said applications be taxed by the Taxing Master as between solicitor and client, and be paid by the said *M. A. M. Willoby* out of the testator's general estate."

Mrs. *Willoby* moved by way of appeal from this order. It is not considered desirable to notice the merits of the case, which turned upon the construction of a very specially worded will.

Mr. *Dickinson*, Q.C., and Mr. *Freeling*, in support of the appeal motion, contended, as regarded the costs, that though under the *Trustee Relief Act* the Court had jurisdiction to order a trustee personally to pay costs in cases of misconduct, yet where the trustee under a will paid a particular fund into Court, there was no jurisdiction to order payment of costs out of the residue, which had not been brought under the control of the Court. The giving the other parties costs as between solicitor and client was, they contended, at all events, erroneous.

Mr. *Karslake*, Q.C., and Mr. *Charles Hall*, for the Respondents, were directed by the Court to confine themselves, as regarded costs, to the question whether the costs were rightly given as between solicitor and client. They said that they could not contend for more than costs as between party and party.

SIR G. M. GIFFARD, L.J. :—

Costs as between solicitor and client cannot be given except to the executrix, but I am of opinion that where an executor who pays a particular fund into Court under the *Trustee Relief Act* has in his hands the general residuary estate, the Court has jurisdiction to order him to pay out of the residue the costs of proceedings relating to the particular fund.

Solicitors: Messrs. *Hunter, Gwatkin, & Hunter*; Messrs. *Hicks & Son.*

L. J. G.
1869
Nov. 6, 13, 20.

Ex parte MORRIS. *In re* DUKE OF NEWCASTLE.

Bankruptcy Act, 1861, s. 69—*Bankruptcy—Non-trader having Privilege of Parliament.*

A non-trader having privilege of Parliament is not exempted from the operation of the *Bankruptcy Act*, 1861.

affd 4 H. L. 661

THIS was an appeal from a decision of Mr. Commissioner *Winslow*. It is unnecessary to enter into any detail of facts, the question being simply whether a person entitled to privilege of Parliament, and not being a trader, could be made bankrupt under the *Bankruptcy Act*, 1861, s. 69. The learned Commissioner decided that he could not.

Mr. *De Gex*, Q.C., Mr. Serjt. *Sargood*, and Mr. *Bagley*, for the Appellant, referred to the *Bankruptcy Act*, 1861, ss. 69, 70; the Bankruptcy Act, 1849, s. 77, and ss. 78-84; *Harris* v. *Lord Mountjoy* (1); *Cassidy* v. *Steuart* (2); *Ex parte Meymot* (3); 4 Geo. 3, c. 33; 10 Geo. 3, c. 50; *In re Bristow* (4); *Ex parte Hepburn* (5); *Stone's* Reading on Stat. 13 Eliz.; *Davis* on Bankruptcy (6).

Sir *Roundell Palmer*, Q.C., and Mr. *Reed*, for the Duke of *Newcastle*, referred to *Blackstone's* Commentaries (7); *May's* Privilege of Parliament (8); *Bac.* Abr. (9), "Privilege" (10); Sir *W. Jones* (11); *Cassidy* v. *Steuart*; 12 & 13 Wm. 3, c. 3; 2 & 3 Anne, c. 18; 11 Geo. 2, c. 24; 10 Geo. 3, c. 50; 4 Geo. 3, c. 24; 34 & 35 Hen. 8, c. 4; 13 Eliz. c. 7; 1 Jac. 1, c. 15; 21 Jac. 1, c. 19; 4 Geo. 3, c. 33; 45 Geo. 3, c. 124; 6 Geo. 4, c. 16; Bankruptcy Act, 1849, ss. 77, 78; *Bankruptcy Act*, 1861, ss. 66, 72, 82, 85, 112, 113, 177, 226; *Broom's* Maxims (12).

Mr. *De Gex*, in reply.

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(1) 2 Leon. 173.
(2) 2 Man. & G. 437.
(3) 1 Atk. 196, 200.
(4) Law Rep. 3 Ch. 247
(5) 15 W. R. 1065.
(6) Page 7.
(7) Vol. i. p. 164.
(8) 6th Ed. p. 116.
(9) Vol. vi. p. 541.
(10) Ibid. 549.
(11) Page 154.
(12) Page 625.

Nov. 20. SIR G. M. GIFFARD, L.J.:—

The question in this case is, whether the Duke of *Newcastle* is exempt from the operation of the bankruptcy laws now in force because he is a peer.

In the argument before me the bankruptcy laws were traced from their commencement up to the Act of 4 Geo. 3, c. 33, and from that period up to the bankruptcy statutes now in force, being those of 1849 and 1861; the privileges of Parliament were also referred to, as asserted from the year 1610 down and subsequently to the date of the 10 Geo. 3, c. 50; and the *dictum* of Lord *Hardwicke* in *Ex parte Meymot* (1) was quoted, as well as the cases of *Harris* v. *Lord Mountjoy* (2) and *Cassidy* v. *Steuart* (3).

Before referring to the statutes of 1849 and 1861, on which, as it seems to me, the question rests and may well be decided, it is, in my judgment, sufficient to state that antecedently to the 4 Geo. 3, c. 33, no special reference was made in any of the Bankruptcy Acts to persons having privilege of Parliament; that the enactments were general; that there appears no reason to doubt but that in one instance, as stated by Lord *Hardwicke*, a commission was issued against the Earl of *Suffolk* for trading in wines, and that, as stated in p. 7 of the Laws Relating to Bankruptcy, by *Thomas Davis*, dated 1774, a commission was issued against *John Burridge*, who was a member of Parliament; that it is to be inferred that there was no contest, at all events in any Court of Law, as to whether these commissions were or were not rightfully and lawfully issued; that there then came the Act of 4 Geo. 3, c. 33, which recited the existence of doubts as to whether commissions could be issued against persons having privilege of Parliament, and contained special enactments relating to such persons; that in every Act from that time, down to and including the Act of 1849, either the Act of Geo. 3 has been continued, or special clauses have been enacted having special reference to persons having privilege of Parliament; that I do not well see how the case of *Harris* v. *Lord Mountjoy* can be reconciled with that of *Cassidy* v. *Steuart*; that whatever may have been the real or asserted extent of Parliamentary privilege in times gone by, the goods, lands, and property of a person having privilege of Parliament, subsequently, at least, to 10 Geo. 3, c. 50, were not, and have not since been, exempt from process; that the *dictum* of Lord *Hardwicke*—for it is not a decision—is a direct expression of opinion by him that "though there may be some particular powers that Commissioners of Bankrupt" cannot "exercise against a peer, yet, notwithstanding this, he may be liable to a commission of bankruptcy;" that I can see no reason why this opinion should be considered contrary to law or sound reasoning, if at its date the privilege of Parliament did not extend to the goods and property of persons having that privilege; and that in present times, at all events, Parliamentary privilege does not extend beyond protection of the person.

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(1) 1 Atk. 201.

(2) 2 Leon. 173.

(3) 2 Man. & G. 437.

With these observations the material sections of the Acts of 1849 and 1861 may be referred to, bearing in mind, first, that it was positively recited in the Act of 4 Geo. 3, c. 33, that that Act was passed to remedy inconveniences and to support the honour and dignity of Parliament; and, secondly, that not only from the *dictum* of Lord *Hardwicke,* but also from the acknowledged canons of construction, the rule to be deduced is, that general words will be so construed as to be subject to the exemptions of persons or property specially exempted, and, on the same principle, as subject to the special privileges of persons specially privileged; or, in other words, that they will not be so construed as to destroy special exemptions or special privileges. It is upon these principles we have to deal with the statutes now in force. The first of them, that of 1849, applied, as all previous bankruptcy statutes had done, to traders only, and, by sect. 65, it enacts, "with respect to persons liable as traders to become bankrupt," that "all traders shall be deemed liable to become bankrupt," and, by the 66th section, "That if any such trader having privilege of Parliament shall commit any act of bankruptcy, he may be dealt with under this Act in like manner as any other trader, but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanours by this Act." So far the matter is clear, and if the Duke of *Newcastle* was a trader there would be no question. Then we have the Act of 1861; that Act is intituled "An Act to amend the Law relating to Bankruptcy and Insolvency in *England,*" and it had for one of its objects that of making all debtors, whether traders or not, subject to the bankruptcy laws. By the 230th section it repealed several sections of the Act of 1849, and enacted in the 232nd that the Act of 1861 "should be construed together with so much of the *Bankrupt Law Consolidation Act*, 1849, as remains unrepealed, as one Act;" and in the 69th section, "As to the persons subject to this Act;" "all debtors, whether traders or not, shall be subject to the provisions of this Act." The argument is, that the words "all debtors, whether traders or not" do not include persons having privilege of Parliament, because those persons are not specially mentioned, but the Act of 1849 specified as traders who were to be subject to the bankruptcy laws traders who had not and traders who had privilege of Parliament." "Traders" in the 69th section of the Act of 1861 cannot be more or less exclusive than "traders" in the Act of 1849, and there is no sound reason for holding that debtors having privilege of Parliament should be excluded from the term "all debtors" when they are included in the term "traders" which follows, unless, at all events, there be a context rendering such a construction necessary, and there is no such context. I am of opinion that the words "all debtors," include debtors having privilege of Parliament, first, because the clause, even if taken alone, might well be read and dealt with as being subject as regards privileged persons to their privileges, without altogether exempting privileged persons; secondly, because the term "traders" includes privileged traders, and "all debtors" are substituted for "such traders." Thirdly, having regard to the reference of the one Act to, and the incorporation of the one with, the other—because the word "traders" in the 66th section of the Act of 1849 must be taken as extended by that of 1861 to all debtors having privilege of Parliament—there is at least one other section of the Act of 1849 in which the word "traders" must be taken as extended to all debtors whether traders or not, that is the 178th; and when the whole of the 69th section is considered, the construction which I have stated to be the true one is further fortified by this, viz., that where it is intended there should be a difference between traders and non-traders that difference is specified, for the end of the section is, "but no debtor who is not a trader shall be adjudged bankrupt, except in respect of some one of the acts

L. J. G.
1869
Ex parte MORRIS.
In re DUKE OF NEWCASTLE.

of bankruptcy hereinafter described." True it is, that persons having privilege of Parliament were not within the repealed insolvency laws, but this was because they could not be arrested on ordinary civil process, and the very object of the Act of 1861 was to put traders and non-traders on the same footing as regards bankruptcy, with some specified exceptions in some matters only, and persons having privilege of Parliament are not among the specified exceptions. If persons having privilege of Parliament are omitted from the Act of 1861 it is from inadvertence, and not from intention. They are included quite as a matter of course in the Act which is to come into operation after Christmas, and though I cannot supply an inadvertent omission, if omission there be, for it is my duty to administer and not to make laws, I have no hesitation in saying that the intention of the Legislature is expressed, and that the case, though, perhaps, of some importance, is sufficiently plain, and quite free from any real difficulty. The proper course, therefore, will be to discharge the Commissioner's order, to remit the petition back to him for hearing, and to direct that the Appellant's costs of this appeal, if there be an adjudication on his petition, be added to the costs of his petition; if there be not, that there shall be no costs of this appeal, and that the deposit be returned.

Solicitors: Messrs. *Lawrance, Plews, & Co.;* Messrs. *Lewis, Munns, & Co.*

L. J. G.
1869
Dec. 4.

Ex parte CYRUS. *In re* BROADRIDGE.

Bankruptcy—Petitioning Creditor's Debt—Indorsement of Bill of Exchange after Act of Bankruptcy.

A drawer of a bill of exchange who has taken it up after an act of bankruptcy committed by the acceptor, but before adjudication, has a debt making him a good petitioning creditor for adjudication against the acceptor on the footing of that act of bankruptcy.

THIS was an appeal by the petitioning creditor from a decision of Mr. Commissioner *Thring,* who had decided that there was not a good petitioning creditor's debt.

Broadridge committed an act of bankruptcy on the 23rd of April, 1869, by an assignment for the benefit of his creditors. At that time bills drawn upon him for value by Mr. *Cyrus*, a merchant in *New York*, to the amount of £1687, were outstanding in the hands of holders for value, and on coming to maturity were dishonoured. Mr. *Cyrus* took them up, and, after having done so, petitioned for adjudication against *Broadridge*. The debt on which he founded his petition was the balance due to him from *Broadridge* on an account, and the question was, whether these bills, of which *Cyrus* was not the holder at the time of the act of bankruptcy, could be considered as constituting a debt for the purpose of adjudication, the balance of account being heavily against *Cyrus* unless these bills were taken into account. The Commissioner considered that the old cases on the subject were overruled by the later ones, and decided that there was not a good debt (1).

(1) The learned Commissioner, after stating the facts, proceeded as follows: The question which the Court has now to determine is, whether a good petitioning creditor's debt can be based on an account of which these bills constitute by far the largest portion. Now, this principle is laid down in the books of practice, that in order to support an adjudication there must be a legal debt of sufficient amount for which, if payable at the time, an action could be maintained by and in the name of the petitioning creditor; but Mr. *Etty* has insisted very strongly in argument that the rule is to be received with the qualification that it is only necessary that the debt should have been due by the bankrupt before the act of bankruptcy, not that it should be due to the petitioning creditor. He has referred to *Griffiths and Holmes*, p. 190, in support of this position, and has cited and commented on a series of cases which are there collected in the notes. It must be observed that all these decisions are of considerable antiquity, and, although in point to a great extent, they cannot be reconciled with more recent cases in which similar questions have been determined. In *Ex parte Botten* (Mont. & Bl. 412) the very point now before me was decided, as it was there held that if a creditor has received and transferred a bill of exchange the holder of the bill at the time of the act of bankruptcy is the proper petitioning creditor. The authority of that case was upheld in *Ex parte Magnus* (2 M. D. & D. 604). I now come to the case of *Ex parte Petrie* (Law Rep. 3 Ch. 232), on which Mr. *Potter* relies. There bills to the amount of £9732 had been drawn by Messrs. *Swire & Sons*, and accepted by *Petrie*. Before the registration of a trust deed executed by *Petrie* part of those bills, to the amount of £2080, had been taken up and were in the hands of Messrs. *Swire & Sons*; the remainder were held by the *Union Bank of Liverpool* under discount, but came into the hands of Messrs. *Swire & Sons* after the registration. Messrs. *Swire & Sons* were entered as assenting creditors for the whole amount. It was held by the Lords Justices that at the time of registration the legal holders

L. J. G.
1869
Ex parte
CYRUS.
In re
BROADRIDGE.

Mr. *De Gex*, Q.C., and Mr. *Hemming*, for the Appellant, referred to *Eden's* Bankruptcy (1); *Deacon's* Bankruptcy (2); *Shelford's* Bankruptcy (3); *Griffiths and Holmes*' Bankruptcy (4); *Ex parte Thomas* (5); *Anon.* (6); *Glaister* v. *Hewer* (7); *Bingley* v. *Madison* (8); 5 Geo. 2, c. 20, ss. 22, 23; 7 Geo. 1, c. 31; *Bankrupt Law Consolidation Act*, 1849, s. 89; and distinguished *Ex parte Botten* (9); *Ex parte Magnus* (10); *Ex parte Petrie* (11).

Mr. *W. Potter*, *contrà*, relied on the three last-mentioned cases.

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and owners of the debt to the extent of £7652 were the *Union Bank*, the holders of the bills. They were the persons who, if matters had remained so, would have been the persons to sue *Petrie*, as indorsees and holders of the bills, and consequently the creditors entitled to assent to or dissent from the deed. It is contended, on the other hand, that the class of cases which have arisen under the provisions of the statute relating to deeds are not analogous, and have no bearing on the right of petitioning creditors; but I am unable to distinguish the position of a petitioning creditor at the time of an act of bankruptcy from that of a creditor whose assent is required at the time of the registration of a trust deed. The act of bankruptcy in the one case, the registration of the deed in the other, is the hinge of the proceeding. Now it is admitted that the amount of bills (£1687) outstanding at the time of the act of bankruptcy is sufficient to extinguish the petitioning creditor's debt, unless the contingent liability of *Cyrus*, as drawer at that period, coupled with the fact that the bills were subsequently taken up by him, be sufficient to support the petitioning creditor's debt. I am of opinion, on the general principles of the law of bankruptcy, as well as on the authority of the cases to which I have referred, that the debt of the petitioning creditor cannot be supported, inasmuch as the holders of the bills for value were the persons entitled to sue *Broadridge* at the date of the act of bankruptcy, and the relative rights of the parties upon this adjudication have not been altered by any subsequent occurrences. The adjudication must therefore be annulled. I have the less reluctance in arriving at this conclusion when I consider the involved state of the current account between the parties on which the debt is founded, for the Lords Justices in *Pott's Case* (31 L. J. (Bkcy.) 34), and in *Scott Russell's Case* (31 L. J. (Bkcy.) 37), have stated as a general rule "that it is an objectionable, or at least an inconvenient, mode of proceeding, and one not deserving of encouragement, to found a petition for adjudication upon a disputed balance of a complicated diversity of cross demands and unsettled accounts."

(1) 3rd Ed. p. 47.
(2) 3rd Ed. p. 127.
(3) 3rd Ed. p. 182.
(4) Page 190.
(5) 1 Atk. 73.
(6) 2 Wils. 135.
(7) 7 T. R. 498.
(8) Cooke, Bkcy. Law, pp. 20–32.
(9) Mont. & Bl. 412.
(10) 2 M. D. & D. 604; Ibid. 723.
(11) Law Rep. 3 Ch. 232.

SIR G. M. GIFFARD, L.J.:—

The authorities, from Lord *Hardwicke* downwards, are all one way, and establish that the transfer after an act of bankruptcy but before fiat of a debt which was due before the act of bankruptcy, makes the transferee a good petitioning creditor. The cases relied on by the learned Commissioner are not in conflict with the earlier authorities. In *Ex parte Botten* (1) the creditor was not entitled to the debt at the date of the fiat. There was not in *Ex parte Magnus* (2) any decision that the debt was bad; and it appears from *Ex parte Magnus* (3) that the Court inclined to the view that the petitioning creditor's debt was good, and all that was done was to substitute a new petitioning creditor's debt that the matter might be free from doubt. In *Ex parte Petrie* (4) bills were outstanding at the date of registration of a creditors' deed, and it was held that the holders of them at that time, which answers to the time of adjudication, were the persons to assent to the deed. Mr. *Hemming* forcibly put what amounts almost to a *reductio ad absurdum*—that if the Commissioner's view of the law be correct no adjudication can ever be obtained on bills which have been indorsed after an act of bankruptcy, for the Commissioner has decided that the indorsee cannot petition, and the indorser, who is no longer a creditor, certainly cannot. The learned Commissioner has entirely mistaken the law, and I should be sorry to have it supposed that there was any doubt upon the point.

Solicitors: Messrs. *Underhill & Field*, agents for *T. Etty, Liverpool; Forrest, Liverpool.*

(1) Mont. & Bl. 412.
(2) 2 M. D. & D. 604.
(3) 2 M. D. & D. 723.
(4) Law Rep. 3 Ch. 232.

L. J. G.

1869

Dec 3.

5 HL. 471

10 Ch 83

20 Eq. 91.

BAILEY *v.* HOBSON.

Partition Suit—Decree for Sale—Injury to Property by Tenant in Common—Selling Hay and Turnips off the Land—Injunction.

After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain a Defendant from destroying or wasting the property.

But where, after a decree for sale in a partition suit, a Defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country as between landlord and tenant:—

Held (reversing the decision of *Stuart*, V.C.), that this was not such a destruction of the property as the Court would restrain, and a motion for an injunction was refused.

THE Plaintiff, *William Bailey*, was seised in fee simple of four-sixths of a freehold farm and lands at *Ainderby-Steeple,* in the county of *York*, as tenant in common with the Defendant *Eliza Hobson*, who had one-sixth, and the Defendant *L. L. Sedgwick*, who had one-sixth of the same hereditaments.

The Defendant *Sedgwick* had been in possession of the farm since August, 1867, and he held it without the consent of the Plaintiff, and under no lease or agreement for a lease from the owners of the other undivided shares. He had paid no rent for it to either of his co-tenants, but paid his share of the interest due to the Plaintiff on a mortgage which he had on the property.

The Plaintiff filed a bill against the other co-tenants praying for a sale or partition, and a decree for a sale was made on the 29th of July, 1869.

In November, 1869, *Sedgwick* issued advertisements that the whole of the hay and turnips of that year's growth on the farm would be sold by auction on the 18th of November, the hay and turnips to be taken off the land. The Plaintiff accordingly moved for an injunction to restrain *Sedgwick* from removing or permitting to be removed any of the hay or turnips grown on the land; and filed affidavits proving that such a course was contrary to the custom of the country, as well as injurious to the land.

The Vice-Chancellor *Stuart* granted the injunction, being of opinion that the act done was an interference with the process of the Court, and the Defendant now appealed from that order.

Mr. *Phear*, for the Appellant:—

The Vice-Chancellor had no jurisdiction to make such an order in this suit. This is a suit for partition or sale, and the Plaintiff can get no other relief than what is incident to the suit. If the Defendant had interfered with the sale, no doubt the Court might have restrained him. But he has done nothing of the kind; he is simply exercising his rights as a tenant in common.

But whatever the form of the suit had been, the Plaintiff would have had no right to an injunction in this case. The custom set up is a custom between landlord and tenant, but there is no such relation between the Plaintiff and Defendant. There was no express contract of tenancy, and the occupation of one tenant in common does not establish that relation between him and the others: *M'Mahon* v. *Burchell* (1); *Henderson* v. *Eason* (2). Nor is the conduct of the Defendant in the nature of a tort, for he is only taking the profits of the land to which he is entitled: *Jacobs* v. *Seward* (3).

Mr. *Dickinson*, Q.C., and Mr. *G. Williamson*, for the Plaintiff:—

There is jurisdiction in the Court to grant an injunction after decree in a partition suit if the Defendant is destroying or wasting the property: *Wright* v. *Atkyns* (4). We admit that there was no relation of landlord and tenant in this case, but the evidence of custom is good as shewing that the conduct of the Defendant is injurious to the land; it is, in fact, a partial destruction of the property. It is similar to the cutting of timber: *Arthur* v. *Lamb* (5); *Twort* v. *Twort* (6); *Goodman* v. *Kine* (7); *Martin* v. *Knowllys* (8). *Jacobs* v. *Seward* is in our favour, for in that case the tenant took the profits in the ordinary course; and it was conceded that if he had destroyed or injured the property it would have been a trespass.

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(1) 2 Ph. 127.
(2) 17 Q. B. 701; S. C. 2 Ph. 308.
(3) Law Rep. 4 C. P. 328.
(4) 1 V. & B. 313.
(5) 2 Dr. & Sm. 428.
(6) 16 Ves. 128.
(7) 8 Beav. 379.
(8) 8 T. R. 145.

L. J. G.
1869
BAILEY
v.
HOBSON.

SIR G. M. GIFFARD, L.J.:—

I am clearly of opinion that no proper case has been made for an injunction. If there had been any destruction of the property, or anything amounting to waste, I should have come to a different conclusion. But the complaint in this case rests on no such ground. All that is alleged is, that as between landlord and tenant, this is a violation of the custom of the country. That only amounts to this, that the land would be in a better state if the hay and turnips were left on it. But as it was admitted that there was no tenancy, the selling of the hay and turnips was what the Defendant had a perfect right to do, and is no tort. The order of the Vice-Chancellor must be reversed, and the Defendant must have his costs in the Court below.

Solicitors for the Plaintiff: Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Fowle & Fowle, Northallerton.*

Solicitors for the Defendant: Mr. *C. Walker*, agent for Mr. *W. Robinson, Richmond, Yorkshire.*

L. J. G.
1869
Nov 20;
Dec. 3, 4.

18 Eq 22

In re BROOKMAN'S TRUST.

Will in pursuance of Marriage Articles—Covenant—Lapse.

A father, on the marriage of his daughter, covenanted that if she should survive him, or leave any child, children, or issue, he would by will give and devise, or otherwise effectually settle and assure to trustees, a share equal with his other children of the property he should have at his death to the uses therein mentioned, being uses for the benefit of the husband and wife and the children of the marriage, with a clause of survivorship and accruer in the event of children dying under twenty-one and without issue. Some years afterwards the father made a will giving property to trustees upon the trusts therein declared, the limitations being in substance the same as those set out in the articles. The children of the marriage all died without issue in the lifetime of the covenantor, one of them only having attained twenty-one. The wife survived her father:—

Held (reversing the decision of *Malins*, V.C.), that the representatives of the child who attained twenty-one were not entitled to anything, for that the covenantor was at liberty to make a settlement either by deed or will, and that he was not bound by the covenant so to frame his will as to guard the child's interest from lapse.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

By articles under seal, dated the 11th of April, 1823, made in

Former case on same Will 8 Eq 202

contemplation of the marriage of *Elizabeth Ann Brookman* with *E. W. Violett*, reciting that "a marriage hath been agreed upon and is intended shortly to be solemnized by and between the said *E. W. Violett* and *E. A. Brookman*, with the consent and approbation of her father, the said *T. Brookman*, testified by his being a party to and executing these presents, and in consideration thereof the said *T. Brookman* hath agreed to make the provision hereinafter mentioned for the said *E. W. Violett* and *E. A. Brookman* and the issue of their marriage, and to enter into the covenant hereinafter contained," Mr. *Brookman* first covenanted with trustees that if the marriage should take effect he would pay to Mr. and Mrs. *Violett* during their joint lives, and to the survivor of them during the life of such survivor, if he, the covenantor, should so long live, the yearly sum of £30; and, further, that if the marriage should be solemnized, and Mrs. *Violett* "should survive the said *T. Brookman*, or dying, leave any child or children, or issue of child or children, he, the said *T. Brookman*, would, by his last will and testament, duly executed by him, and valid and effectual in the law, give and devise, or otherwise well and effectually settle and assure to proper trustees to be named by him," a child's share, or equal part with his other children, of all the real and personal estates which he should die seised or possessed of, to the use of *E. W. Violett* for life, subject to a proviso determining his interest on his bankruptcy or insolvency, with remainder to trustees to preserve contingent remainders, with remainder to Mrs. *Violett* for life, with remainder to trustees to preserve contingent remainders, "with remainder to the child or children of the said intended marriage, or any one or more, or all and every of them, for such estates" as the husband and wife should "at any time or times and from time to time during their joint lives," by deed or writing, jointly appoint, and in default of joint appointment as the survivor of the husband and wife should by deed or will appoint, and in default of appointment "to the use of all and every the child or children of the said intended marriage, equally to be divided between or among them, if more than one, share and share alike as tenants in common, and their several and respective heirs and assigns, for ever," with a clause of survivorship and accruer in the event of any dying under twenty-one without issue; and if

L. J. G.
1869
In re
BROOKMAN'S TRUST.

there should be but one such child, and such one child should live to attain the age of twenty-one years, or, if dying under such age should leave lawful issue, then to the use of such only remaining or only child, his or her heirs and assigns: And in case there should be no child of the marriage, or all should die under the age of twenty-one years without leaving issue, "then to the use of the heirs and administrators (according to the tenure or quality of the same property) of the said *E. A. Brookman* as if she had died sole and unmarried." There was a proviso that if Mrs. *Violett* should die in her father's lifetime without issue surviving her at the time of her decease, "then the covenant hereinbefore mentioned as to a child's share or part shall cease, it being understood and agreed that the said *E. W. Violett* shall have no claim or title to such child's part or share." There was a covenant to settle after-acquired property of the wife "upon the same trusts and in like manner as is hereinbefore expressed and declared of and concerning the estate and property so as aforesaid settled by the said *T. Brookman*, or as near thereto as the deaths of parties, or other intervening circumstances, will admit or allow." It was further agreed that "the last will and testament of the said *T. Brookman*, and the settlement to be made as aforesaid, shall be penned in the most full, clear, explicit, and liberal manner, to effect the intention of the parties thereto, and with all usual, fit, customary, and proper limitations, trusts, clauses, powers, and provisions, for or to that end."

T. Brookman, by his will, dated the 23rd of January, 1840, after reciting the marriage articles, and his desire to specifically perform his covenant according to the true intent and meaning of the articles, devised and bequeathed certain freehold and leasehold estates and sums of money, and one-fourth of his residuary personal estate (he having four children), to trustees; as to the freeholds, to the use of Mr. *Violett* until he should die or become bankrupt or insolvent, and after his bankruptcy or insolvency, in trust for the separate use of Mrs. *Violett* during the joint lives of herself and Mr. *Violett*, and after his death, to the use of Mrs. *Violett* for life, with remainder to the use of the children of Mr. and Mrs. *Violett*, as they or the survivor should appoint, and in default of appointment, to the use of all and every their children and child as tenants in common, with benefit of survivorship in the event of any child dying under twenty-one without leaving issue, and in case every child should die under twenty-one without leaving issue, then to the use of the heirs and assigns of Mrs. *Violett,* as if she had continued sole and unmarried, with remainder to the testator's right heirs in case Mrs. *Violett* should die in his lifetime, and without leaving any issue surviving her; and as to the leaseholds, upon corresponding trusts; and as to the moneys and share of personal estate, upon trust to invest and pay the income unto or for the benefit of such person or persons as the rents of the freehold and leasehold premises should from time to time be payable to under the trusts declared in the will, "and in case, by reason of the failure of issue of Mrs. *Violett,* there should be no person or persons who, under the limitations thereinbefore in that behalf contained, should acquire a vested interest in the said leasehold premises, stocks, funds, and securities, then he directed that the trustees should stand possessed of the said leasehold premises, stocks, funds, and securities in trust for the person or persons who, at the time of such failure of issue as aforesaid of Mrs. *Violett,* would, by or under the *Statute of Distributions,* be entitled thereto, and to be divided among them in the shares in which the same would be divisible under the said statute."

Thomas Brookman died in 1849. All the children of the marriage died in his lifetime without issue, and one only, *William Violett,* lived to attain twenty-one. Mr. *Violett* became an insolvent in 1850. In 1856 Mrs. *Violett,* by deed duly acknowledged, made a settlement of her interest in the real and leasehold estates comprised in the above devise, giving herself a power of appointment by deed or will. She died in 1868, having exercised her power of appointment by will in favour of *G. Smith,* the then trustee of the will of *Thomas Brookman.*

On her death *George Smith* transferred into Court, under the *Trustee Relief Act,* a sum of consols representing the fourth part of the residue of *T. Brookman's* personal estate and the sums of money bequeathed by the will.

The next of kin of Mrs. *Violett* presented a Petition for transfer of the fund to them. The assignee in insolvency of Mr. *Violett* contended that the fund belonged to him on the ground that *William Violett* took an indefeasibly vested interest which passed

L. J. G.
1869
In re BROOKMAN'S TRUST.

to his father. *George Smith* made a claim on the ground that the sums of money bequeathed by the will were under circumstances which, as the Court did not decide the point, need not be mentioned, to be treated as real estate, and so became subject to Mrs. *Violett's* power of appointment.

Vice-Chancellor *Malins* decided in favour of Mr. *Violett's* assignee, holding that *William Violett* acquired a vested interest in the fund under the articles, which made it unnecessary to enter upon the question as to Mrs. *Violett's* power of appointment (1). The next

(1) 1869. June 5. SIR R. MALINS, V.C., after stating the facts, continued:—

The sole question is, what was the interest of the only son of the marriage who attained twenty-one. If it is a right depending on the articles, then he took an absolute vested interest at the age of twenty-one; if his interest depended on the will, then as he died in the lifetime of the testator, either there is a total intestacy, or it went over under the gift over contained in the will. Upon the view I take of the case it is perfectly unnecessary to enter into the question of what the operation of the will is. I am of opinion that the rights of these parties do not depend on the will, but on the marriage articles.

Now it has been argued, and in support of this argument the case of *Jones* v. *How* (7 Hare, 267) was relied upon, that inasmuch as by these marriage articles the contract was to provide by will for the husband and wife and the issue of the marriage, no person can take anything by virtue of these articles who did not survive the testator, because no person can take under a will unless it be persons in existence at the time of the death of the testator, with the single exception that is made by the 33rd section of the *Wills Act*, which in case of the death of the children of the testator carries over the property as if they had died immediately after the testator instead of in his lifetime. There is no doubt that if it is a contract to make a will in favour of particular objects, those objects not existing at the death of the testator, the contract falls to the ground, and has no operation. In the case of *Jones* v. *How* the testator, by a settlement on the marriage of his daughter, covenanted that he would leave to his daughter absolutely, not to her and her children, an equal share of his estate with his other children. The daughter died in his lifetime; by his will, therefore, of course she was incapable of taking anything. If the testator had made a will, and the *Wills Act* had not been in operation, there would have been simply an intestacy. This case coming on for argument before Sir *James Wigram*, instead of deciding the question himself, he adopted that course, which was a great misfortune to the suitors of this Court at that time, that is, he sent a case for the opinion of the Court of Common Pleas, and the question submitted was, whether in the events that had happened there was any subsisting contract on on the part of the testator, and the answer of the Court of Law was, that there was no breach of contract. On the cause coming on again before Sir *James Wigram* he confirmed the certificate. [His Honour read the judgment in *Jones* v. *How*, and continued:—] Now what ought to have been the decision there? There was a contract of kin and *George Smith* appealed, but the argument was confined to the question whether the assignee was entitled.

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by a man for valuable consideration that he would by his will leave to his daughter an equal provision with his other children; if he had performed that covenant, which he ought to have been compelled to do, or his estate to bear the consequence, what would have been the result? There would have been found in that will a bequest to the daughter of a fourth part of his property. If she had left children, the 33rd section of the *Wills Act* would have made the bequest to the daughter to take effect, and the consequence would have been, that if the husband had survived the testator he would have taken it and have provided for his family, and if he had died in the lifetime of the testator, her children, as next of kin, would have taken, and the object of the covenant, which was to make a provision for her family, would have been secured, or if the father had died intestate and the daughter had left children, the children would have taken her share; but by this narrow construction put upon it by Sir *James Wigram* the whole object was defeated. If I had that very case now to decide, I should decide it in direct opposition to that decision, and I should hold the covenant must be performed. And yet I am asked to extend that case, from which I entirely dissent, to a case to which it has no application.

Now what is the object of this covenant? The daughter being about to marry, the father does not think fit to name any particular sum; whatever his circumstances were at that time, he did not know what they would be at the time of his death. If, instead of entering into a covenant that he would leave to his daughter an equal share with his other children, he had covenanted that his executors should after his death pay £10,000, and that that £10,000 should be settled on the husband for life, the wife for life, and then to the children attaining twenty-one years, nobody in that case would say that a child who died in the testator's lifetime was not an object of the settlement; the moment the son attained twenty-one he would have had a vested interest in that £10,000, which he could have made the subject of sale or settlement, or any arrangement he thought fit. Here the testator did not think fit to bind himself to any particular sum; instead of that he says, "You shall have the same as my other children have; but if neither you nor any of your children are living at the time of my death, then it is unnecessary to make a provision for them." What has he contracted to do? That if she survives him, as she did, he will leave, not to her or her children, not to persons incapable of taking, but he will leave to proper trustees, to be named by him, an equal share with his other children; and how is it to be dealt with? It is to be held on trust to pay the interest to the husband till he became bankrupt or insolvent, which he did, to the daughter for her life, with remainder to the child or children as they shall appoint, and in default of appointment to all the children, with a proviso that if any die under twenty-one his share shall go over to those who attain twenty-one, and if they all die under twenty-one it is to go over to the next of kin of the daughter. *William*, the only one who attained twenty-one, died in the lifetime of the testator, but he died after that period which, by the settle-

L. J. G.

1869

In re BROOKMAN'S TRUST.

Mr. *Hardy*, Q.C., and Mr. *Everitt*, for the next of kin:—

This is not a suit to enforce the covenant. The fund is held on the trusts of the will, and the Court cannot go behind the will. If

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ment, is made the period of the final and absolute vesting of his interest under the settlement. The object being to provide for the daughter and her issue under this settlement, what sort of justice would it be to put this narrow construction upon it, that (he having contracted that one-fourth part of his property shall go by his will or otherwise to trustees, and that the trustees are to hold it on trust for his daughter for life, with remainder to the children who attain twenty-one), because the son after attaining twenty-one happened to die in the lifetime of the settlor, therefore he is not to be an object of this settlement for no other reason than this—that the amount of the provision is to remain in uncertainty until you ascertain the extent of the testator's property at his death, it being perfectly clear upon the authorities that the covenant only bound the property at the time of his death, leaving him the free power of alienating all his property up to that time.

The only case relied on in support of the argument is that case of *Jones* v. *How; Barkworth* v. *Young* (4 Drew. 1(1) cannot be characterized as amounting to any decision at all on this point; but so far as it goes it is an intimation of the opinion of Sir *Richard Kindersley* that a provision of this kind to make a settlement by will does not come to an end by the death of the children. Upon these grounds I am of opinion that the rights of the parties here do not depend on the will of the testator. If I were to hold that they did I should be conceding to him the power of putting his own construction on the language of these marriage articles. I am quite sure he intended by his will to fulfil his obligation, and he has misconceived his duty by going beyond that which the settlement authorized him to do. Subject only to the clause of cesser, which I will deal with presently, the contract became absolute, and the property vested under the articles in the son *William* immediately on his attaining twenty-one. The consequence is, that from him it will go in the usual course of law to his father as his administrator.

But then there is the clause which Mr. *Hardy* has very much relied upon, which is this: at the end of the settlement there is a proviso that in case *Elizabeth Brookman* shall die in the lifetime of *Thomas Brookman* without issue surviving her at the time of her decease, then the covenant as to a child's share shall cease, it being understood and agreed that the said *E. W. Violett* shall have no claim or title to such child's part or share. The answer to that is, that it has no operation, because the event did not occur. I cannot hold that the father can be excluded from taking by devolution that which was the absolute property of the child when he attained his majority.

There is one other clause which goes far to support the view I take in this case, which is the provision that whatever property the wife shall acquire during coverture shall be settled upon the trusts thereinbefore expressed and declared of and concerning the said estates and property so as aforesaid settled by the said *Thomas Brookman*. If I were to accede to Mr. *Hardy's* argument, the consequence would be,

(1) 3 Jur NS 34

L. J. G.
1869
In re BROOKMAN'S TRUST.

it could, the result would be the same. The covenantor was not bound to settle by deed; he could elect to settle by will. The covenant prescribes the form of will, and he has followed it. The Court cannot import an agreement to make a will with elaborate provisions against lapse. [*Needham* v. *Kirkman* (1); *Needham* v. *Smith* (2); *Jones* v. *How* (3); *Eyre* v. *Munroe* (4); *Barkworth* v. *Young* (5); *M'Ghie* v. *M'Ghie* (6); *Walsh* v. *Wallinger* (7); and *Laughter's Case* (8), were referred to.]

Sir *Roundell Palmer*, Q.C., and Mr. *Speed*, for *George Smith*, referred to *Stanley* v. *Stanley* (9).

Mr. *Glasse*, Q.C., and Mr. *Jason Smith*, for the assignee of Mr. *Violett* :—

William Violett upon attaining twenty-one took a vested interest under the marriage articles in the property which the testator covenanted to settle. The rights and interests are ascertained and declared by the articles, the amount of the property to be settled alone remained uncertain. The covenant was to take effect if Mrs. *Violett* died in the lifetime of the testator leaving issue, whether such issue survived the testator or not. The covenant was either to devise by will, or otherwise settle and assure, it might therefore have been performed by deed; and it could not have been intended that the interests of the parties should depend on whether the settlement was made by deed or by will. Moreover, the devise or settlement was not to be made to Mrs. *Violett* and her children, but to trustees to the uses limited by the articles. The object of the articles, namely, to make a provision for the daughter, her

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that if the wife acquired property during coverture this contract would have come to an end, because the argument is, that in the events that have happened there is no settlement whatever. If there is no settlement of the father's property, there can be no settlement of the wife's, the argument being that there is no trust now existing. That goes far to corroborate the view I have taken. Upon the whole, I am clearly of opinion that it is the proper construction to put upon these articles, and the declaration will be accordingly.

(1) 3 B. & A. 531.
(2) 4 Russ. 318.
(3) 7 Hare, 267.
(4) 3 K. & J. 305. 3 Jur N S 584
(5) 4 Drew. 1. 3 Jur N S 34
(6) 2 Madd. 368.
(7) 2 Russ. & My. 78.
(8) Co. Rep. xi. 41.
(9) 16 Ves. 491.

L. J. G.
1869
In re
BROOKMAN'S
TRUST.

husband and children, would be defeated by excluding from it a child who attained the age when a provision is necessary, simply because he predeceased the settlor. According to the Petitioner's contention no child who predeceased *Thomas Brookman* could take any interest in the after-acquired property of Mrs. *Violett* which was to be settled on the same trusts. In *Jones* v. *How* (1) Sir *James Wigram* doubted whether the covenantor might not have made a will so as to preserve to his daughter the benefit of the covenant notwithstanding her death in his lifetime; and in *Barkworth* v. *Young* (2), upon a similar covenant to that in *Jones* v. *How*, where the daughter left issue, it was held that the testator was not absolved from his covenant.

SIR G. M. GIFFARD, L.J.:—

The Court cannot alter the settlement. I can only look to the terms of the covenant, and I cannot import anything into it which I do not find to be fairly deducible from its words. First of all, I do not think that the matter is at all affected by the recital in the settlement, for it is a mere recital that Mr. *Brookman* intended to do what is done by the covenant, whatever the construction of the covenant may be. In the next place, I do not think that the construction of the covenant is affected by the covenant to settle the wife's after-acquired property. That covenant provides that the after-acquired property is to be settled upon the trusts detailed in the previous covenant, but that is apart from and irrespective of the father's will. Again, I do not think that the proviso as to cesser of the covenant in case Mrs. *Violett* should die in the lifetime of *Thomas Brookman*, without issue surviving her at the time of her decease, controls what we find in the covenant.

Then when we come to the covenant itself, first of all the subject matter with which we have to deal is something which cannot be ascertained until the death of the covenantor, for it relates only to the property he is seised or possessed of at the time of his death. Then, we have a state of things which I think is not so favourable to the contention of the Appellants as the state of things was in the case of *Jones* v. *How*, or *Needham* v. *Smith* (3), for this is

(1) 7 Hare, 267.

(2) 4 Drew, 1. 8 Jur Nd 84

(3) 4 Russ. 318.

obviously a contingent covenant, and there were certain events in which, though there might be children who might have issue, yet those children, or those issue, could not by possibility take anything, because if there was a child who died before the daughter that child would take nothing, and even if the child died leaving issue, that issue, if dying before the daughter, would take nothing unless Mrs. *Violett* survived her father. The covenant is expressed to be contingent upon several events, and is an alternative covenant. Now, I take the rule of law with reference to a covenant of this kind, to be perfectly plain to this extent, that a person who enters into an alternative covenant has his choice between the alternatives, so that here the covenantor was not bound to do more than to make such a will as the covenant requires; he was not bound to make any provision by deed. The only question, then, which I have to consider is, was or was not the settlor bound, in the events which happened, to make a will which would provide against lapse not only as respects children living at the date of the will, but to make a will which would go the whole length of providing for a child who might have died years before the date of the will? I confess I can see nothing in the covenant which has that effect. It is, no doubt, true that if children had survived their mother, and died in the testator's lifetime leaving issue who survived him, then, according to the covenant, a will would have to be made; and I can conceive that if that state of things had occurred, the testator probably would have been bound to state the facts in his will, and to say my daughter has died, her children have died, those children have all left issue, and that being an event in which I am bound to make the will, I make the will, and I make it in favour of the children. Had this been done, I should feel no difficulty in saying that he did not intend there should be a lapse, but that the issue should take as through children dying in his lifetime. But that does not shew there were to be other provisions against lapse, and the words are as plain as it is possible for words to be—if the covenantor's daughter survives him, or if she dies in his lifetime and leaves children or issue, he is bound to make a will in a given way, but nothing more. The first thing he is bound to do is to devise and bequeath to trustees. I cannot gather from that that there is to be any provision against lapse. The interposition of trustees has no

L. J. G.
1869
In re BROOKMAN'S TRUST.

more effect in fact than if there had been no trustees at all, the trustees being merely conduit pipes to uses. The covenant is really nothing but a covenant in given events to make a given will in given terms, and the terms are all specified. Nothing can be founded upon the declaration contained in the covenant that the construction is to be a liberal one. That will not authorize the Court to alter the requisitions of the covenant as to the terms of the will where the terms are so completely and entirely specified as they are here, so completely, indeed, that you might take them from the covenant and insert them in the will which has to be made.

Then, that being so, what is the law? If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take. For these reasons I am of opinion that the order below must be reversed. The costs of all parties will come out of the fund.

MINUTES.—Declare that *William Violett* did not become entitled, and remit the case with that declaration to the Vice-Chancellor.

Solicitors: Messrs. *Pitman & Lane*; Messrs. *Digby, Sharp, & Large*; Messrs. *Farmer & Robins*.

SIMPSON *v.* BATHURST.
SHEPHERD *v.* BATHURST.

L. C.
1869
Dec. 13, 17.

Power to take Fines on Renewals—Right of Donee of the Power to keep the Fines—Effect of Alienation or Bankruptcy on the Power—Pleading—Supplemental Order—Bankruptcy of the Plaintiff—Conduct of Trustee.

6 Ch. 128; –
S.C.L.D. 3
23 Ch D.

The Plaintiff executed a post-nuptial settlement whereby he conveyed certain freehold hereditaments, the legal estate in which was outstanding, to a trustee upon trust to pay the rents, issues, and profits to the Plaintiff's wife during her life, and after her death to the Plaintiff during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to the Plaintiff during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. And it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. The Plaintiff subsequently assigned his interest under the settlement to *B.* by way of mortgage.

The trustee of the settlement disputed the right of the Plaintiff to take the fines for his own benefit, claiming them on behalf of the wife. The Plaintiff accordingly filed a bill against the trustee and *B.*, praying that he might be declared entitled to take the fines on renewals of leases for his own benefit.

After the filing of the bill the Plaintiff became bankrupt, and his assignee obtained a supplemental order to carry on the suit. The cause came on to be heard in the form of two suits, one by the original Plaintiff against the original Defendants, and the other by his assignee against the original Defendants:—

Held, first, that on the construction of the settlement the Plaintiff was entitled to take the fines on renewals for his own benefit:

Secondly: That inasmuch as the legal estate was outstanding and beyond the Plaintiff's control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights:

Thirdly: That the power of granting renewed leases was not extinguished or suspended either by the assignment of the Plaintiff's interest by way of mortgage or by his bankruptcy, but that such power might be still exercised by him with the concurrence of the mortgagee and assignee.

Decision of *James*, V.C., reversed.

Semble, the defect in the suit caused by the bankruptcy of the Plaintiff was properly cured by the supplemental order, as the two suits were brought on together.

The trustee, having acted as a partizan of the wife against the husband, and refused information to those who wished for renewals of leases, was refused his costs.

THIS was an appeal from a decree of Vice-Chancellor *James*.

By an indenture of settlement, dated the 7th of August, 1834,

L. C.
1869

SIMPSON
v.
BATHURST.

SHEPHERD
v.
BATHURST.

made subsequently to the marriage of *Valentine Bennett Simpson*, the Plaintiff in the original suit, with the Defendant *Catharine Dorothy Simpson*, after reciting that the Plaintiff had proposed and agreed to settle and convey the hereditaments thereinafter mentioned in manner thereinafter mentioned, the Plaintiff, in pursuance of the said agreement, and for making a provision for the Defendant *Catharine Dorothy Simpson*, and the children of the Plaintiff, conveyed certain freehold messuages at *Sheerness*, the legal estate in which was outstanding in a mortgagee, to the Defendant *Julius G. Shepherd*, in trust during the joint lives of the Plaintiff and his wife to pay the rents, issues, and profits of the said premises to the Defendant *Catharine Dorothy Simpson* for her separate use, and after the decease of either of them to pay the rents, issues, and profits to the survivor during his or her life, and after the decease of the survivor upon the trusts therein declared for the benefit of the children of the marriage, with an ultimate trust in default of children for the Plaintiff, his heirs and assigns for ever: Provided always, and it was thereby agreed and declared, that it should be lawful for the Plaintiff during his life, and after his decease for the Defendant *Catharine D. Simpson*, and after the decease of the survivor for the said *J. G. Shepherd*, his heirs and assigns, from time to time and at all times during the minority of any child or children who should be entitled to an estate of inheritance in the said premises, to demise and lease all or any part or parts of the said premises to any person or persons for any term of years not exceeding ninety-nine years, determinable on the death of one, two, or three persons, or for one, two, or three lives absolute, and to take any fine or money for granting such leases, so as upon every such lease there be not reserved and made payable during the continuance thereof less yearly rent than should have been theretofore usually reserved and paid for the premises whereof such lease or leases should be so granted as aforesaid: Provided always, that the said *Julius G. Shepherd*, his heirs and assigns aforesaid, should stand possessed of any fine or money to be taken by him or them for the granting of any such lease or leases in trust for the child or children who, by virtue of the limitations or trusts aforesaid, should then be entitled to an estate of freehold and inheritance in the said premises.

The Plaintiff subsequently mortgaged his interest in the premises comprised in the settlement to the Defendant *Richard Brightman* for a sum of money, part of which was afterwards paid off, and which amounted at the time when the bill was filed to £800.

In the year 1843 the Defendant *Richard Bathurst* was appointed trustee of the settlement in the place of *Shepherd*, who was desirous of being discharged.

The Plaintiff renewed the leases of several of the houses which were let on lives, and received the fines for renewal, which he applied to the use of himself and his family.

In the year 1847 the Plaintiff ceased to live with his wife, and went to reside abroad; and he now charged the Defendant *Bathurst* with preventing persons who desired to renew their leases from applying to him for a renewal, with refusing to give them information as to the property, or to produce the deeds, with dissuading the Defendant *Brightman* from joining in such renewals, and with disputing the right of the Plaintiff to take the fines for his own use. One case in particular was relied on in the argument, in which a tenant of the name of *Howe* was desirous of taking a renewed lease, but was deterred from doing so by the refusal of *Brightman* to concur, and by the representations of *Bathurst* that the Plaintiff had no authority to grant renewals.

The bill prayed that it might be declared that according to the true construction of the settlement the Plaintiff was entitled during his life to grant or renew leases of the premises, and to take the fines for his own use, provided that there were not reserved during the continuance of such leases less yearly rents than had been usually reserved before the date of the settlement; that if necessary the settlement might be reformed by inserting a declaration to that effect; and that *Bathurst* might be removed from the trusteeship and a new trustee appointed.

Subsequently to the filing of the bill the Plaintiff became bankrupt, and the said *Julius G. Shepherd* was appointed his creditors' assignee. The assignee obtained a supplemental order under the 52nd section of the *Chancery Amendment Act*, to carry on the suit; and the cause was brought to a hearing in the form of two suits, one by the original Plaintiff against the original Defendants,

L. C.
1869

Simpson
v.
Bathurst.

Shepherd
v.
Bathurst.

and the other by the assignee against the original Defendants. The Vice-Chancellor, in consequence of the interest of the Plaintiff in the suit having been vested in his assignee, refused to make any declaration as to the right of the Plaintiff to grant leases, and dismissed that part of the bill without costs; and, considering that he had shewn no title to the rest of the relief prayed, dismissed the rest of the bill with costs. From this decision the Plaintiffs in both suits appealed.

Mr. *Morgan*, Q.C., and Mr. *Cookson*, for the Plaintiffs:—

We contend, that on the construction of the settlement the Plaintiff *Simpson* was entitled to the fines on renewals for his own benefit. The intention was, that the ordinary income from the rents should belong to the wife, and that the Plaintiff should have the benefit of any occasional profits. This is rendered clear by the express declaration that when the trustee exercised that power he should hold the fines in trust for the children; if it had been intended that the Plaintiff should hold them in trust there would have been a similar declaration in his case.

The power of leasing is still vested in the Plaintiff. It was not lost by the assignment of his interest to the mortgagee, although it is true that he could not have exercised it without the mortgagee's consent: *Sugden* on Powers (1). Nor was it extinguished by the bankruptcy: *Badham* v. *Mee* (2); *Thorpe* v. *Goodall* (3); *Jones* v. *Winwood* (4). Nor did it pass to the assignee, for it was a power for the benefit of the estate, at all events during the life of the wife. It could be exercised by *Simpson* so long as such exercise did not interfere with any acts of the assignee: *Long* v. *Rankin* (5).

With respect to the present frame of the suit, the suit did not abate by *Simpson's* bankruptcy, and he still properly remains a Plaintiff, and under the old practice of the Court his assignee could have carried on the suit by a supplemental bill: *Mitford* on Pleading (6). It is, therefore, now sufficient that he should obtain a supplemental order.

With respect to *Bathurst*, the trustee, he has acted as a partizan

(1) 8th Ed. p. 58.
(2) 7 Bing. 695.
(3) 17 Ves. 460.
(4) 10 Sim. 150; 3 M. & W. 653.
(5) Sugd. Powers, 8th Ed., App. 895.
(6) 5th Ed. p. 79, n.

of Mrs. *Simpson*, and has rendered this suit necessary by opposing the rights of the Plaintiff, and ought, therefore, to pay the costs.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, for the Defendant *Bathurst*:—

The power to grant renewals was not intended for the benefit of the husband, but for the benefit of the wife and children; and if it was meant that the husband should take any advantage from the exercise of the power, it would have been expressly stated. The "rents, issues, and profits" are given to the wife and children, and those words are sufficient to include fines: *Taylor* v. *Horde* (1). The trustee has not been to blame, for it was his duty to protect the interest of the wife and children. It was, moreover, necessary to take the opinion of the Court on the construction of the settlement and the rights of the Plaintiff, for no lessee could get a good title under the present circumstances.

Mr. *Willcock*, Q.C., and Mr. *W. Pearson*, for Mrs. *Simpson*:—

The Vice-Chancellor was right in refusing to make any declaration as to the power of sale. The power was lost when the Plaintiff conveyed all his interest to *Brightman*. But it is still clearer that he can have no *locus standi* now that he has become bankrupt. He is not even before the Court. For the suit became abated by his bankruptcy, and his assignee obtained an order under the 52nd section of the *Chancery Improvement Act* that he might prosecute this suit in his place. The only ground for the order must have been that all the Plaintiff's interest had been transferred to the assignee.

Mr. *Bond Coxe*, for the Defendant *C. Simpson*, the daughter of the Plaintiff.

Mr. *Morgan*, in reply.

Dec. 17. LORD HATHERLEY, L.C.:—

In this case the Plaintiffs in the original and supplemental suits are the Appellants complaining of the dismissal of the bill by the Vice-Chancellor.

(1) 1 Burr. 60, 121.

L. C.
1869

SIMPSON
v.
BATHURST.

SHEPHERD
v.
BATHURST.

I propose first to consider how matters would have stood when the original bill was filed if no bankruptcy had ever taken place. The Plaintiff by his bill sought to have a declaration of his right under a voluntary settlement which he had himself executed, and the construction of which it is necessary to determine in order to ascertain whether the Plaintiff had any right at all; and the question will then arise whether it was either necessary or proper for him to come to this Court for the declaration of those rights. [His Lordship read the prayer of the bill, and the material clauses of the settlement, and continued:—] It was pressed upon me in argument that it could not be intended that the husband should take the fines for his own benefit, inasmuch as the provisions of the deed are expressly stated to be to make provision for *Catherine Dorothy Simpson* and the children of the Plaintiff. I do not think there is much force in that argument; for if provision is made for them, it is not inconsistent with the intention of the settlement that provision should be made for others also. There is nothing to lead to the inference that the Plaintiff intended to exclude himself from all benefit; on the contrary, a life estate is given to him.

It was contended that the words "rents, issues, and profits," would in themselves carry the fines. I think the authorities seem to shew that might be so if there was nothing in the deed giving directions about the fines; but the authorities can hardly apply to a settlement of this kind.

With respect to the construction of the power, it is contended that the power given to the husband to take fines simply means that his was the proper hand to execute leases—the selection and choice of tenants being reserved to him, and the consideration of the expediency or inexpediency of granting the leases—that although he is to take the fines there is nothing said about his taking them for his own use, and that in the absence of any such direction it ought to be held that they passed under the assignment of the rents and profits to *Shepherd*, he being the owner of the estate out of which the leasehold interest was to be created. It appears to me, both upon the reason of the thing and the position of the parties, and also upon the true construction of the whole instrument, that it was intended that the husband should have these fines for his own benefit, and that his wife, when she received the fines, was to have them for her own benefit, and that *Shepherd* was to pay over everything which he received to the children. It seems very reasonable to suppose that the Plaintiff might conceive that the usual annual income was a sufficient provision for his wife and children, and he is therefore not to be allowed to deprive them of that income, which is to be taken at the usual rents; that is to say, not the usual rents anterior to the execution of the settlement, but the usual rents payable at any time when the power came to be exercised. But there is nothing inconsistent with this in his reserving to himself the fines which he is authorized to take. On the construction of the whole of this instrument it seems to me reasonable that he should have a right to exercise this power for his own benefit, especially as he took a life estate only after his wife's death.

But the case is really stronger than this, for there are three persons to whom the power is reserved—first, the husband, then the wife, and then *Shepherd.* When *Shepherd* has the power vested in him care is taken to say what trusts are annexed to the fines, and I think that in this case the rule *expressio unius, exclusio alterius,* is applicable.

This seems to me the true construction of the deed, and I am happy to think that it was considered a reasonable construction by all the parties interested, and acted upon by them, until a quarrel arose. It is true that authorities may be cited, as in *Taylor* v. *Horde* (1), to shew that fines ought to follow the limitations of the estate. But that does not apply to a case where the creator of the trust has shewn that he intended to reserve to himself a beneficial interest under the settlement. As to rents, they stand on a different footing. It was said that you cannot separate the fines from the rents. But that is easily done; they are, in effect, separated by the deed itself. The fines will go to the donee of the power, and the rents to the persons entitled to the property subject to the power.

The next question which is raised is this: Was it right for the Court to make any declaration as to the Plaintiff's rights? I think it was right, and for two reasons. First, there was an outstand-

(1) 1 Burr. 60, 121.

L.C.
1869
Simpson
v.
Bathurst.
Shepherd
v.
Bathurst.

ing legal estate over which the parties have no control, and they were therefore compelled to come here to have a decision upon the construction of the settlement, which, on the face of it, appears to create legal estates. I take the doctrine of the Court to be, that where there is a legal estate outstanding over which the parties have no control, they are entitled to come here for a declaration of the trusts, because the legal estate prevents any ejectment or other proceeding at law. Of course where the parties have control over the legal estate, the proper course is to seek to restrain the persons holding the legal estate from dealing with it, in order that the right may be tried at law.

But there is another reason in this case, namely, that the trustee of this settlement claims the fines. It is said that he did not do so before the suit, and that he only interposed when the premises happened to be unlet. But if he did not, the Plaintiff's wife did, and that has rendered it necessary to ascertain the rights of the parties in order that the trust may be carried into effect. And we have evidence, especially in the case of Mr. *Howe*, that the Plaintiff has been seriously impeded in granting leases by this claim. In that case, where everything was prepared for granting a lease, communications were made by the solicitor for the trustee, who was also solicitor for *Brightman*, the mortgagee of the Plaintiff, which raised difficulties, and that gentleman refused to give any information with reference to the property and the tenants, and otherwise impeded the execution of the trusts. I think, therefore, that the Plaintiff could not by executing a lease try the question at law, and that it was necessary to come here for a declaration of his rights.

A difficulty was raised in the original suit, with which I am now dealing, as to the Plaintiff's position with reference to *Brightman*, to whom he had mortgaged his interest; and it was argued that this effected either an extinguishment or a suspension of the power. It appears to me, however, to be settled by authority that the simple fact of a mortgage does not extinguish a power of this nature, although, of course, the donee of a power can in no case defeat his own instrument. So that the true question in such cases is not whether the power is gone, but whether the donee by exercising it is or not interfering, or attempting to interfere, with any other rights which he has created. If he cannot exercise the power without derogating from such rights he cannot exercise it at all, but if he can do so in harmony with such rights he is at liberty to do so. There can be no difficulty in the Plaintiff exercising his power under the circumstances of this case, but *Brightman's* concurrence must be obtained; for he being an assignee of the fines has an interest in every renewal which may be granted.

The next difficulty is this: the Plaintiff became bankrupt, and a supplemental order was obtained by his assignee in bankruptcy, Mr. *Shepherd*, and the suit has been conducted by him as if he stood in the place of the bankrupt. Now difficulties have been raised as to the rule of pleading, but I think they do not interfere in this case with justice being done. If it were necessary to have any further proceedings taken in that respect, I should have very little difficulty in finding a way of assisting the Plaintiff so that his right should not be lost by a mere matter of pleading. But it appears to me that when the supplemental order was obtained it stood in the place of a supplemental bill. No doubt a supplemental bill might have been filed in one of two ways. The bankrupt being the person to exercise the power, with the concurrence of the assignee, it might have been either filed by the assignee joining the bankrupt as co-Plaintiff, or it might have been filed by the assignee, asking for such a declaration as might be necessary, and making the bankrupt a Defendant; in which case he might have possibly stood in a more difficult position than he does now, when he is acting in concurrence with the bankrupt. Considering the mode in which the suits have been hitherto heard and discussed, I think I am entitled to consider them as two suits, which would have the same effect as a supplemental suit in which the bankrupt and his assignee concur, because the two suits are brought on together. The original suit is not absolutely gone, but only becomes defective by the bankruptcy. That defect has been supplied by bringing the assignees here, and both suits are brought on together before the Vice-Chancellor. No objection was taken before the Vice-Chancellor, and the decree was made in both suits; and now both suits are brought on before me. I think that at this stage of the proceedings it is too late to raise the objection, but, as

L. C.
1869

SIMPSON v. BATHURST.

SHEPHERD v. BATHURST.

I have said, if it had been necessary I should have given leave to file a supplemental bill.

That being so, what is the effect of the bankruptcy upon the power? The effect is no more than that of a mortgage in that respect. I do not think that the power is one that falls within the provisions of the Bankruptcy Acts, which provide that the assignee may exercise all such powers for his own benefit as the bankrupt could have exercised. It is a power coupled with certain duties which may to a certain extent affect the whole estate. I do not think the power is vested in the assignee, and if the assignee is willing to concur, I think the case of *Long* v. *Rankin* (1) is a conclusive authority that, notwithstanding the alienation of the life interest of the Plaintiff by bankruptcy, the power may be exercised, so that it be done without prejudice to the rights of the assignee. I think, therefore, that the Plaintiff was entitled to a declaration that, with the concurrence of *Brightman* and *Shepherd*, he has authority to exercise the power for his own benefit.

With respect to the trustee *Bathurst*, for whose removal the bill prays, he has, for the reasons he has himself stated, taken upon himself to be a partizan of the wife, and thrown impediments in the way of tenants obtaining leases from the husband, and has refused production of the deeds, which, as trustee, he was bound to produce to all persons interested in the trust. He has, therefore, in great measure rendered the suit necessary; but under all the circumstances, as the trustee is now better informed as to his duties, I think it will be the best course not to remove him. He has, however, put himself in such a position that I cannot give him his costs; but in the absence of any proof of improper motive I do not make him pay any.

The decree will be to this effect: Declare that according to the true construction of the indenture of settlement the Plaintiff in the original suit was entitled to receive for his own use the fines to be received on any leases granted by him in pursuance of the power of leasing therein contained. And that he is still entitled, with the concurrence of the Defendant *Brightman* and of the Plaintiff in the supplemental suit, to execute leases in pursuance of the power, but subject to their respective right with regard to the fines

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(1) Sugd. Powers, 8th Ed., App. 895.

L. C.
1869
Simpson
v.
Bathurst.
Shepherd
v.
Bathurst.

receivable on the exercise of such power, which might have been payable to the Plaintiff in the original suit but for his execution of the indenture of mortgage and his bankruptcy. The Plaintiff in the supplemental suit to pay *Brightman* his costs, and to retain them, as well as his own and the bankrupt's costs, out of the bankrupt's estate.

Solicitors for the Plaintiffs: Messrs. *Lewis, Munns, & Co.*

Solicitors for the Defendants: Messrs. *Bower & Cotton.*

COOPER *v.* COOPER.

L. C.
1869
Dec. 16, 18, 21, 22.

Power—Appointment—Benefit to Appointor—Infancy of Appointee—Bargain between Appointor and Husband of Appointee.

A., having an exclusive power of appointment among his children (five in in number), who were entitled equally in default of appointment, in 1832, in pursuance of articles, on the marriage of a daughter, *C.* (who was of age), appointed a share to her, to be held upon the trusts to be declared by her marriage settlement. He also gave a bond for payment of an equal sum to the trustees. By the settlement, which followed the trusts of the articles, the funds were limited for the benefit of the husband and wife during their respective lives, and then for the benefit of their children, but the ultimate trust, in default of issue, was for *A.*, his executors, administrators, and assigns. There were no children of the marriage, and *C.* having survived her husband, who died in 1832, afterwards, in 1841, married the Plaintiff.

In 1834 *A.* appointed another share to another of his daughters, *E.* (who was an infant), on her marriage, and gave a bond for payment of an equal sum to her trustees. The trusts of the settlement were similar to those of *C.'s* settlement, the trust in default of issue being for *A.*, his executors, administrators, and assigns.

In 1835 *A.* became bankrupt, and proofs were made by the trustees on the bonds, in respect of which considerable dividends were received. In 1866 *A.* died, and in 1867 *C.'s* and *E.'s* shares were paid to their respective trustees, and the other shares to the other children, and a release was taken from the parties interested.

C.'s share was afterwards paid into Court under the *Trustee Relief Act.*

C.'s husband filed a bill praying that the appointments to *C.* and *E.* might be declared frauds upon the power, and that the fund might be divided as in default of appointment:—

Held, with regard to the appointment to *E.* (who was an infant at the time of her marriage), that the bargain under which *A.* reserved to himself an ultimate interest in the appointed fund, was a bargain between *A.* and the

L. C.
1869
COOPER
v.
COOPER.

10 Eq 8
3 Ch D. 437.

intended husband, and was not corrupt or improper, so as to render the appointment invalid.

The Court refused to make any declaration as to the appointment to *C.* (who was of age at the time of her marriage), because the fund had been paid into Court under the *Trustee Relief Act*, and the rights of all parties, including questions which had arisen under the bankruptcy, and were not in issue in the suit, could be better decided under that Act.

The decree of *James*, V.C., affirmed, but on different grounds.

THIS was an appeal from a decree of Vice-Chancellor *James* (1).

By a settlement made on the marriage of *Thomas Daniell* with *Lucy Maria Osbaldeston*, dated the 8th of September, 1806, certain funds were settled upon trust for the husband and wife for their respective lives, and after the death of the survivor upon trust for the children of the marriage, in such shares and in such manner as *Thomas Daniell* and his wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment in trust for all and every the children equally, with provision for vesting the shares at twenty-one or marriage. There were five children of the marriage who would have attained a vested interest in default of appointment—*Elizabeth Jane* (Mrs. *Burmester*), *Maria Gertrude* (Mrs. *Trevanion*, afterwards Mrs. *Cooper*), *Sophia* (Mrs. *England*), *Ralph Allen*, and *Marianne.*

On the 14th of February, 1832, *Maria Gertrude*, being then about twenty-three years of age, was married to *G. O. B. Trevanion.* In contemplation of the marriage, articles of agreement were executed, bearing date the 11th of February, 1832, by which it was recited that *J. T. P. B. Trevanion*, the father of the said *G. O. B. Trevanion*, proposed to execute an appointment of £666 13*s.* 4*d.* *India* Stock, £6066 15*s.* 7*d.* Consols, and £595 £3½ per Cent. Reduced Bank Annuities in favour of his son, and in consideration of the marriage *Thomas Daniell* and his wife agreed to execute their joint power of appointing one-fourth of the settled funds in favour of their daughter, *Maria Gertrude ;* and *Thomas Daniell* also agreed to secure by his bond the sum of £4567, payable in 1840, with interest in the meantime ; and that the sums to be appointed, and sum secured by the bond, and the future property of the said *Maria Gertrude Daniell*, should be settled on the trusts thereinafter expressed. And the trusts of the property were declared to be, to pay the interest to *G. O. B. Trevanion* during his life, and after his death to *Maria Gertrude* his wife, and after the death of the survivor to divide the principal among the children of the marriage as Mr. and Mrs. *Trevanion*, or the survivor of them, should appoint, and in default of appointment to the children equally, or to the issue of any deceased child, and in default of issue who should acquire a vested interest, then and in such case the moneys intended to be settled by *G. O. B. Trevanion* should go and belong to his executors, administrators, and assigns; and the moneys intended to be settled by *Thomas Daniell* and his wife should go and belong to the executors, administrators, and assigns of the said *Thomas Daniell.*

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(1) Law Rep. 8 Eq. 312.

J. T. P. B. Trevanion, by deed-poll dated the 10th of April, 1832, appointed the sums agreed on to and for the benefit of his son *G. O. B. Trevanion.*

By deed-poll, dated the 10th of April, 1832, Mr. and Mrs. *Daniell*, after reciting the marriage articles, in consideration of the marriage appointed one-fourth part of £11,834 Consols, and of two sums of £4000 and £3590 sterling, to *Maria Gertrude Trevanion* as her portion of the settled property.

By bond, under his hand and seal, dated the 11th of April, 1832, *Thomas Daniell* became bound to the trustees of his daughter's marriage settlement in the penal sum of £10,000, with a condition avoiding the same if he should in or before 1840 pay the sum of £4567, with interest at £5 per cent.

On the same day a settlement was executed in pursuance of the articles, whereby the trusts, in default of issue of the marriage, of the funds settled by Mr. and Mrs. *Daniell* were declared to be for *Thomas Daniell*, his executors, administrators, and assigns.

There was no issue of the marriage. *G. O. B. Trevanion* died on the 10th of September, 1832.

On the 17th of June, 1841, Mrs. *Trevanion* married the Plaintiff, *F. B. Cooper.* On the occasion of his marriage a settlement was executed, by which Mrs. *Trevanion* assigned all her interest under the settlement of 1832, or derived from her late husband, to trustees, as to one moiety of the income, for her own separate use for life, without power of anticipation, and as to the other moiety, for her husband for life, with survivorship in both moieties, and after their death for the benefit of the children, and in default of issue to the survivor of the husband and wife.

Upon the marriage, in 1834, of another of their daughters, *Sophia* (who was then an infant), to Captain *England*, Mr. and Mrs. *Daniell* appointed a further fourth share of the funds subject to the settlement of 1806, in her favour, and *Thomas Daniell* executed a bond for payment of £4000 in or before 1842, with interest in the meantime. The trusts of Mrs. *England's* settlement were similar to those of Mrs. *Trevanion's*, the ultimate limitation, in default of issue of the marriage, of Mrs. *England's* fortune being for *Thomas Daniell*, his executors, administrators, and assigns. There were children of this marriage, to some of whom, on their marriage, appointments had been made by Mr. and Mrs. *England*.

In 1835 *Thomas Daniell* became bankrupt. Under his bankruptcy several dividends had been paid on the two bonds, which had been invested by the trustees.

In 1844 two other fourths were appointed to *Ralph Allen* and *Marianne*.

By an indenture, dated the 15th of May, 1849, the assignees sold to the trustees of the *Economic Life Assurance Society*, subject and without prejudice to Mrs. *Cooper's* life interest therein, *Thomas Daniell's* reversionary interest in the appointed share of Mrs. *Cooper*, and also in the invested dividends on the bond for £4567.

Thomas Daniell survived his wife, and died in 1866. *Aldridge*, the surviving trustee of the settlement of 1806, thereupon transferred to the trustees of Mrs. *Cooper's* settlement and to the trustees of Mrs. *England's* settlement their respective shares in the trust funds subject to the settlement of 1806, and transferred the remainder to the other children of Mr. and Mrs. *Daniell*. At the same time he took a release, dated the 19th of March, 1867, from all the parties interested under the settlement of 1806, in which the Plaintiff concurred. The surviving trustee of Mrs. *Cooper's* settlement transferred her share into Court under the *Trustee Relief Act*.

Under these circumstances this bill was filed by *F. B. Cooper*, submitting that the appointments made upon the marriages of

Mrs. *Trevanion* (afterwards Mrs. *Cooper*) and Mrs. *England* were frauds upon the power of appointment contained in the settlement of 1806, as being made for the purpose of obtaining a benefit to *Thomas Daniell*, and praying they might be declared invalid, and that the funds might be divided as in default of appointment.

The Vice-Chancellor held that there was no corrupt or sinister purpose on the part of *Thomas Daniell*, and that the appointments were valid, and dismissed the bill with costs. The Plaintiff appealed from this decision.

In the course of the argument it appeared that an important question might arise between the trustees of Mrs. *Cooper's* settlement and the assignees of *Thomas Daniell's* reversionary interest, whether the trustees were entitled to set off the arrears of interest due on the bond given by *Thomas Daniell* on Mrs. *Cooper's* marriage against his reversionary interest; but this point not being raised by the pleadings, was not argued at the bar.

Mr. *Jessel*, Q.C., Mr. *Kay*, Q.C., and Mr. *W. C. Druce*, for the Plaintiff:—

The rule is imperative that an appointor shall acquire no interest directly or indirectly from the exercise of the power. It is not necessary that there should be a sinister intention, as the Vice-Chancellor assumes, and the Court will not go into the *quantum* of the benefit bargained for; the power is in the nature of a trust, and no bargain can be made of a trust: *Daubeny* v. *Cockburn* (1); *Arnold* v. *Hardwick* (2); *Duke of Portland* v. *Topham* (3); *Palmer* v. *Wheeler* (4); *Lane* v. *Page* (5); *Birley* v. *Birley* (6). The appointments being bad the settlements cannot stand. They cannot be bad in part and good in part. It is said that the Plaintiff is estopped from complaining of these appointments. But that is not so, for he had no notice of the circumstances. The question was only raised after the death of *Thomas Daniell*. The release which he executed was only operative to discharge the trustee. It did not bind those beneficially interested from contesting their rights *inter se*.

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(1) 1 Mer. 626.
(2) 7 Sim. 343.
(3) 11 H. L. C. 32. 10 Jur. N.S. 501
(4) 2 Ball. & B. 18.
(5) Amb. 233.
(6) 25 Beav. 299. 4 Jur. N.S. 315.

L. C.
1869
COOPER
v.
COOPER.

Mr. *Fischer*, for Mrs. *Cooper*, supported the same arguments:—

Although Mrs. *Cooper* was of age at the date of the settlement, she was still under parental influence, and was not precluded from now contesting it. He referred to *Sugden* on Powers (1); *Connolly* v. *M'Dermott* (2); *Jackson* v. *Jackson* (3); *Tucker* v. *Tucker* (4).

Sir *Roundell Palmer*, Q.C., and Mr. *Hemming*, for the trustees of the *Economic Life Assurance Society*:—

This is an attempt to make equitable principles the instruments of fraud. Where a minute benefit to the appointor does not enter into the motive and intent of the appointment, there is no rule that such benefit shall avoid the appointment: *Topham* v. *Duke of Portland* (5). There are no circumstances shewing fraud alleged in the bill, no misunderstanding, no ignorance of rights. There is nothing before the Court but the deeds which have been executed, and the Court is asked to make out from them a fraudulent bargain. The burden of proof of fraud lies on the person attempting to upset the appointment. Here the benefit to the appointor was not the motive of the appointment, as he gave much more than he took: *Askham* v. *Barker* (6). The settlement on Mrs. *Cooper* was perfectly fair and beneficial to her. Her husband brought property into the settlement, and her father gave a bond equal to the amount of the appointed share. There would, therefore, be no sinister purpose in the transaction: *White* v. *St. Barbe* (7); *Stroud* v. *Norman* (8); *Cockcroft* v. *Sutcliffe* (9); *Noel* v. *Walsingham* (10); *Lee* v. *Head* (11); *Jebb* v. *Tugwell* (12); *Fitzroy* v. *Duke of Richmond* (13). It was in the nature of a family arrangement, and the parties are too late now to overthrow it. Mrs. *Cooper* is completely estopped from setting aside her settlement. She was of age when it was executed, and she survived her first coverture, and she has all along enjoyed her life interest under it.

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(1) 8th Ed. pp. 609, 672.
(2) Sug. H. of L. 513.
(3) 7 Cl & F. 977.
(4) 13 Price, 607.
(5) 1 D. J. & S. 517.
(6) 17 Beav. 37.
(7) 1 V. & B. 399.
(8) Kay, 313. 10 Jur 264
(9) 25 L. J. (Ch.) 313. 2 Jur NS 323
(10) 2 S. & S. 99.
(11) 1 K. & J. 620. 1 Jur NS 792
(12) 7 D. M. & G. 663. 2 Jur NS 55
(13) 27 Beav. 190. 5 Jur NS 978.

The Plaintiff, also, is estopped by the release of 1867, by the proof under the bankruptcy, and by the whole course of conduct of himself and his wife, who was *particeps criminis*, if fraud there was: *Head* v. *Godlee* (1); *Horne* v. *Barton* (2); *Robinson* v. *Wheelwright* (3); *Skelton* v. *Flanagan* (4).

Mr. *Eddis*, Q.C., and Mr. *Hamilton Humphreys*, for Mrs. *England* and her children:—

Whatever bargain there may have been with regard to the appointment in Mrs. *Cooper's* case there could be none in Mrs. *England's*. She was an infant at the time of her marriage, and therefore could not be a *particeps criminis*. The Court will not overthrow an appointment as against an innocent party in cases where the bad part of the transaction can be separated from the good. And this is expressly the case where there has been a marriage, as the parties cannot be restored to their original position. In the present case, the only thing complained of is the ultimate limitation to the father, which may be set aside without interfering with the rest of the settlement, and is cured by the fact that he gave a much larger benefit by his bond: *Lane* v. *Page* (5); *Palsgrave* v. *Atkinson* (6); *Alexander* v. *Alexander* (7); *Bristow* v. *Warde* (8); *Crompe* v. *Barrow* (9); *Sadler* v. *Pratt* (10); *Langston* v. *Blackmore* (11); *Rucker* v. *Scholefield* (12); *Carver* v. *Richards* (13).

Mr. *Robinson*, for the personal representative of the last surviving trustee of the settlement of 1806.

Mr. *Jessel*, in reply.

LORD HATHERLEY, L.C.:—

This appeal comes before me under very peculiar circumstances, and I think it will be necessary to deal mainly, I may say entirely, with the settlement of Mrs. *England*, because unless the portion of the fund settled on Mrs. *England* is affected by a fraud on the power, there is nothing for this suit properly to operate upon. The fund included in Mrs. *Cooper's* settlement has been paid into Court under the *Trustee Relief Act.* As to that, the rights of the parties may or may not be hereafter decided under that Act, and there are questions relating to that fund which cannot be properly discussed in this suit. I allude to those which concern the position of the father and his daughter, supposing the settlement made on Mrs. *Cooper's* first marriage to stand in respect of the bond by which the father engaged to pay an annual income equal to the income of the trust fund. This income commenced immediately on the marriage, and his bankruptcy having prevented the payment, a serious question arises, how he can withdraw any portion of the settled fund without making good that amount of interest, which amounts to more than the value of the fund which is in Court. I cannot determine that on the present application. The question ought to have been raised distinctly in the bill in order that the Defendants might make such answer as they might think fit, and which they may embody in any petition to deal with the particular fund.

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(1) Joh. 536. 6 Jur NS 495
(2) 8 D. M. & G. 587. 2 Jur NS 1082
(3) 6 Ibid. 535. 2 Jur NS 554
(4) Ir. Law Rep. 1 Eq. 362.
(5) Amb. 233.
(6) 1 Coll. 190.
(7) 2 Ves. Sen. 640.
(8) 2 Ves. 336.
(9) 4 Ibid. 681.
(10) 5 Sim. 632.
(11) Amb. 288.
(12) 1 H. & M. 36. 9 Jur NS 17
(13) 27 Beav. 488 5 Jur NS 1412

As to Mrs. *England's* fund, the case is free from a good deal of the difficulty which might exist as to the other fund. She was an infant, and could enter into no bargain with her father, and that must have been known to him as well as to herself. The bargain, if any, was made with the husband on the treaty for the intended marriage, and must be deduced from the instruments solely, for beyond them no evidence is given on the subject. The facts are these:—About thirty-four years before the filing of the bill a marriage took place between Mrs. *England*, she being at that time a minor, with Captain *England*. On that occasion a deed-poll was executed which recited the intended marriage, and that on the treaty of the marriage it was agreed that an appointment should be made in order that the appointed fund might be settled; and Mr. and Mrs. *Daniell* thereby made in due form an appointment of one-fourth of the trust fund to this daughter, Mrs. *England*. At that time there were five children who might or might not take shares under any appointment to be executed under the original settlement of 1806. One of those children, for reasons which are not apparent, was left by the father and mother without any benefit from this trust fund, and there remained four children in whose favour appointments have been made. One of them, Mrs. *Cooper* (formerly Mrs. *Trevanion*), two years before this time, being adult, had received one-fourth of the fund by appointment. The appointment in favour of Mrs. *England* was, therefore, made at the proper time, namely, the time of the marriage of the child, when the portion would be naturally raised, and there is nothing in the extrinsic circumstances of the case to lead to an inference that there was any impropriety on the part of the father in doing that which it was in a sense his duty to do, namely, to make provision for his daughter on her marriage. The share appointed was the ordinary share, and everything is in favour of its being a reasonable and proper transaction. Coupled with this is the fact that it is recited in the deed that the appointment is made in order that the fund may be settled, which was perfectly right, especially as she was a minor. But in the settlement, after the usual limitations to the husband and wife, and then to the children, the ultimate trust in default of any children of the marriage is in favour of the father. In that settlement, as also in that on the marriage of Mrs. *Trevanion*, the father enters into a bond for payment of a certain sum, with interest in the meantime, which, under the settlement, would be payable to the daughter during her life.

There being this reservation, it is said the case falls within that class of authorities which have decided that a donee of a power cannot stipulate for any benefit for himself with reference to the exercise of the power; and that if he does so, the whole appointment is vitiated by the consideration that he has not made it with the simple intention of providing for the children; and that you cannot separate such part of the transaction as has been done under the influence of the corrupt bargain from the other part, but the whole appointment must be held to be void in favour of all those who take in default of appointment. I should be extremely sorry to say a word that would tend to break in on a rule so well and so justly established. Undoubtedly there would be considerable difficulty in dealing with a deed of this description if any such bargain were proved, notwithstanding the father's making a provision which is said to be equal or greater in value than the ultimate reversion which he takes, because it is obvious that in the event of the husband and wife dying early without issue the father might take an interest far greater than anything he has provided. It seems to me, therefore, an exceedingly doubtful transaction in any way to support. But in the case of Mrs. *England's* settlement the bargain was not to take anything out of the daughter's share, but the husband says to the father: "I will settle the fund in this way; but in the event of my wife dying, and there being no issue, and any right accruing to me, except under the settlement, I waive altogether my marital right, and the fund shall go back to you or the family of my wife." I have not found any case which goes to the extent of overthrowing a bargain which was not a bargain with the daughter, not a bargain to induce the father to make the appointment. In the present case the deeds are all put before me, and nothing else, without a word of evidence or explanation, and I am entitled to construe them in a reasonable way, taking into consideration the whole transaction. I find no authority for saying that this is such a bargain as can be supposed to have influenced the father's mind in making the appointment, and without which it would not have been made. I put the question, as Lord Justice *Knight Bruce* put it in the course of the argument in *Topham* v. *Duke of Portland* (1): "Would the appointment have been made but for the condition?" The answer is "Yes." The appointment is made of a reasonable and proper share, and it is settled reasonably and properly, and the whole result of the settlement takes nothing from the daughter. All that comes to the father is such claim as he may have against the husband, so that it shall not go to the husband's family.

In that view of the case, merely having these documents laid before me without a single word to lead to any other conclusion, it seems to me that that settlement is unimpeachable.

Having regard to the course of dealing with this settlement, the Court would hesitate before it came to a conclusion in favour of the present applicant. The settlement was more than thirty years before the bill, and although it is true that Mr. *Daniell* did not die till 1866, and the fund being reversionary the Plaintiff's right did not accrue till that time, yet, looking to the enjoyment by the Plaintiff of his wife's share under her settlement, and the subsequent dealing with the funds in the manner they have been dealt with, in the marrying of a daughter and establishment of a son in the world, and then, finally, a release to the trustees, in which Mr. *Cooper* himself joined, I think there is very much to support the Vice-Chancellor's judgment, but I prefer resting my decision on the ground that I see nothing in Mrs. *England's* settlement which should induce the Court to set the appointment aside. It would be a great injustice to say that you are to interfere with the interests of Mrs. *England's* children in consequence of the supposed influence that might have been created in the father's mind, and led him so to deal with the appointment. I hold that the influence is not such an influence as could affect the case. I really consider it as a virtuous and proper transaction from the beginning to the end, in which the father takes care that the interests of the children shall be protected, and simply protects the family property against the marital right which would otherwise transfer it away altogether from the source from which it came in 1806, and he puts it back into that channel in which it found itself at the time of the marriage.

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(1) 1 D. J. & S. 555.

If that be so, there is nothing more in the suit, because the only fund that remains is Mrs. *Cooper's* fund, which is now in Court under the *Trustee Relief Act*, under which the rights of all parties interested in the fund, including the *Burmesters*, who have made no complaint in the present suit, can be dealt with and fully discussed. Whether a bill should or not be necessary it is not for me now to determine; I think I am justified in saying that any question to be determined as to that fund, and the rights that may arise on it, will be of a totally different character from anything that is raised in the present controversy, namely, whether or not the fund may be applicable to the recouping of that which *Thomas Daniell*, in consequence of his bankruptcy, did not pay as he was by his covenant bound to do. That being so, the only point that could be suggested in favour of making a decree is that Mr. *Cooper* claims that his rights ought to be declared. According to his contention, if he can upset the settlement made on the marriage of his wife with Mr. *Trevanion*, it will appear that his

L. C.
1869
COOPER
v.
COOPER.

wife has received more than her share of the income, but he has the chance by survivorship of one-eighth of the whole fund. But ought the Court to entertain a suit on the application of a husband so situated, the whole result of which will be, if he succeeds, to deprive his wife during her life of a considerable portion of her income, merely for the possible chance of obtaining the survivorship in one-eighth?

I cannot see that this is a suit which is to be met with any favour at all, if the Court is not bound in its duty to act upon it. Here is an expensive suit instituted, which fails in the main part, and the really main part is to get at Mrs. *England's* share. The appeal must be dismissed as against the *Englands* with costs; and I do not think it right to proceed with the other part as to Mrs. *Cooper's* settlement in this cause, because there is another course of proceeding in which all those rights may be ascertained more effectually in every respect than they can be in this suit. I affirm the Vice-Chancellor's decree, and dismiss the appeal as against the *Englands* with costs. I give no costs to the other Defendants.

Solicitors; Messrs. *Druce, Sons, & Jackson;* Messrs. *Young & Jackson;* Mr. *W. H. Haycock;* Messrs. *Walters, Young, & Deverell;* Messrs. *Johnson & Weatheralls.*

L. C.
1870
Jan. 14, 21.

HAYWARD *v.* PILE.

*Leaseholds—Trustees—Enfranchisement—Consent of Court—Ecclesiastical Commissioners—*23 *&* 24 *Vict. c.* 124*—Power to Purchase—Corporation Aggregate.*

10 Eq 577
16 Eq 165.
3 Ch D 329
332, 333, 340.
6 Ch D. 715.

A testatrix bequeathed leaseholds held under a dean and chapter to trustees on trust for a tenant for life, with remainders over, and with power to raise money for renewing the leases. The property became vested in the Ecclesiastical Commissioners, with whom the trustees of the will agreed for the purchase of the reversion in part of the leaseholds, in consideration of the surrender of the other part, and the payment of a sum of money. The estate of the testatrix was administered by the Court, and the agreement was made subject to the approval of the Court:—

Held, (affirming the decision of the Master of the Rolls,) that the Court would not approve of the agreement against the wish of the tenant for life, if his income would be considerably reduced by the purchase.

Trustees with power to renew, have power to purchase the reversion in leaseholds, under 23 & 24 Vict. c. 124; and that Act applies to the estates of corporations, both aggregate and sole.

BETTY HAYWARD by her will devised to *R. Pile* and *J. R. Neate* certain freeholds and leaseholds, and all other her real estate and personal estate, upon trust, to pay the rents and income thereof to or for the benefit of her son *Philip Hayward,* during his life; and after his death to sell the same and stand possessed thereof for her nephews and nieces therein mentioned, some of whom were children of the trustees *Pile* and *Neate.* And the testatrix directed that her trustees should, if they thought fit, but not otherwise, at the usual times and periods, or at such other times and periods as they should deem expedient, procure a renewal of the lease or leases of her leaseholds aforesaid, and should for that purpose raise money as therein mentioned. By a codicil to her will she gave further directions as to the payment of the income to her son, and limited her estate after his death to his children, if any, and, in default, to the same persons to whom it was given by her will. She died in July, 1864.

A suit was instituted by *Philip Hayward,* for the administration of *Betty Hayward's* estate, to which suit the trustees of the will and the persons entitled in remainder were parties; a decree was made, and the usual accounts were directed and taken.

Part of the estate consisted of leaseholds, held under the Dean and Chapter of *Bristol,* for twenty-one years from the 23rd of June, 1859; and by virtue of the Acts of Parliament relating to the Ecclesiastical Commissioners of *England,* and an Order in Council of the 7th of January, 1862, this property had become vested in the Ecclesiastical Commissioners, subject to this lease.

By articles of agreement dated the 25th of February, 1869, and made between the Estates Committee of the Ecclesiastical Commissioners of the one part, and *Pile* and *Neate,* the trustees of the will, of the other part, it was agreed, that in consideration of £407, to be paid by *Pile* and *Neate,* and of the surrender to the Commismissioners of part of the leaseholds, the Commissioners would convey to *Pile* and *Neate* the reversion expectant on the lease in

L. C.
1870

HAYWARD
v.
PILE.

the other part of the leaseholds; and the agreement was made conditional on the approval of the Court of Chancery.

A summons in the suit was taken out by *Pile* and *Neale*, for the approval of the Court, and evidence was produced that the Commissioners would not renew the lease, and that the arrangement proposed would be beneficial to the estate of *Betty Hayward*.

The Plaintiff, who was seventy years of age, and a bachelor, opposed, as the annual income of the leaseholds would be very materially reduced by the arrangement with the Ecclesiastical Commissioners.

The Master of the Rolls, before whom the summons was heard, said that the proposed exchange could not be effected without the consent of the tenant for life, which the Court would not compel him to give. The Court had no means of apportioning between the tenant for life and the remainderman, and in the exercise of its discretion the Court would not approve of the agreement

The trustees appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Bevir*, for the Appellants:—

The will empowers the trustees to renew; that can no longer be done, and the best thing they can do for the estate is to purchase the reversion, which they are empowered to do by 23 & 24 Vict. c. 124, ss. 20, 39: *Morres* v. *Hodges* (1), was before that Act. It may be a hardship on the tenant for life, but if the lease is allowed to run out, it will be still more hard on the reversioners. If there had been no suit the trustees could have made this agreement under the Act without consulting the tenant for life; the power is given to them, not to the tenant for life. The Court may, when the transaction is completed, make an arrangement giving a larger share to the tenant for life, but has no right to interfere with this agreement. The mere accident of a suit existing ought to make no difference.

Mr. *Jessel*, Q.C., and Mr. *Holmes*, for *Philip Hayward*:—

If the trustees wanted to renew under the will they must come to the Court for leave, and will not be allowed to renew on such terms as these. The remaindermen are chiefly the children of the

(1) 27 Beav. 625.

trustees, and if the consent of the Court is required the Court will never consent to a bargain of this kind.

Moreover the trustees have no power to purchase the reversion under these Acts. It is true that under sect. 20 of the Act 23 & 24 Vict. c. 124, they have power to raise money for the purpose of purchasing the reversion, but nowhere is power to purchase given. Nor does the section apply to the case of corporations aggregate; only to a corporation sole. The Act 14 & 15 Vict. c. 104, s. 1, did apply to a corporation aggregate, but that Act has expired, and this Act is only intended to apply to the estates of bishops and archbishops, except when corporations aggregate are expressly mentioned. The Act 17 & 18 Vict. c. 116, does not assist the Appellants.

Sir *R. Baggallay* in reply.

Jan. 21. LORD HATHERLEY, L.C.:—

This is a motion by way of appeal from an order of the Master of the Rolls, or rather from the refusal on his part to make any order with reference to the proposed purchase of the reversion of certain leasehold estates held by the trustees under the will of the testatrix in the cause, by means of an exchange purporting to be made under the Acts of Parliament which have been passed with reference to church leaseholds; the question being, in fact, between the tenant for life and those who are interested in reversion.

The Master of the Rolls has refused to make any order, upon this ground, that, if it be necessary to ask the Court for its permission, the Court will not give its sanction to an arrangement of this character, which would deprive the tenant for life of a very considerable portion of his income, whilst the benefit of the arrangement would go to those in reversion who happen to be the children of the trustees; though I do not think that that circumstance, in itself, ought to weigh very much with the Court, because the testatrix herself has constituted those persons her trustees, knowing them to be the parents of the persons in remainder.

But, independently of that question, it has been argued before me, that although there was power given by the Act to trustees to raise money for the purchase of the reversion of the estates, there is no power given them to purchase the reversion, and that the Act can only apply where the persons who are about to raise money have themselves some power of purchasing the reversion.

I have carefully looked through the whole of these Acts, and I cannot come to such a conclusion, which would render them all but nugatory. Nor can I find anything in the Acts to justify the conclusion that those clauses apply only to corporations sole, to the exclusion of corporations aggregate. I should be very sorry to come to that conclusion, as it would very much interfere with the operation of the Acts, which were intended to be beneficial to all parties.

The ground upon which the Master of the Rolls has put his decision is that on which I shall deal with this case, and I think that the Court ought not to give its sanction to the arrangement here proposed.

Since this case was argued I have looked at the decision of the Vice-Chancellor *Wigram* in *Jones* v. *Jones* (1). The trustees in that case did rather more than has been done here, and threw the whole trust upon the Court, but here the trustees do nearly the same thing when they ask the Court to sanction their proceedings. [His Lordship then read the judgment of the Vice-Chancellor in *Jones* v. *Jones*, pp. 461, 462.] This passage shews that the Court will not sanction such a course of proceeding if it is clear that it would throw the burden unduly upon any particular person. In this particular case the burden would be most unduly thrown upon the tenant for life; acting therefore upon the spirit and principle which governed Vice-Chancellor *Wigram's* decision in that case, and following the view which has been taken by the Master of the Rolls, I cannot possibly approve of an agreement by which so great an injustice would be effected.

I cannot find any mode of doing justice between the parties, as the Acts of Parliament have not provided any remedy for a case like this, and I can only dismiss this appeal with costs.

Solicitors: Messrs. *Wood, Street, & Hayter;* Messrs. *Stuart & Massey.*

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(1) 5 Hare, 440.

STONE *v.* THOMAS.

L. C.
1870
Jan. 21, 22, 28.

Creditors' Deed—Administration of Trusts—Concurrent Jurisdiction of Chancery and Bankruptcy—Special Circumstances—Pleading.

Post 749
11 Eq 128
12 Eq 21
12 Eq 63
12 Eq 84
6 Ch 557
7 Ch [illegible]
14 Eq [illegible]
8 Ch 85
16 Eq [illegible]
2 Ch D. 55

The jurisdiction of the Court of Chancery in the administration of creditors' deeds is not excluded by the *Bankruptcy Act*, 1861; but the Court of Chancery will not exercise its jurisdiction except in cases where the Court of Bankruptcy is unable to give adequate relief.

A creditor filed a bill against the trustees of a creditors' deed, alleging that one of the trustees had purchased some of the property at an undervalue, and praying that the sale might be set aside, and the trusts of the deed administered by the Court:—

Held, that this was not a sufficient ground for the exercise of the jurisdiction of the Court, and the bill was dismissed with costs.

Martin v. *Powning* (1) approved of.

An objection to the jurisdiction, although not raised in the pleadings, was allowed to be taken at the hearing, the state of the law on the question of jurisdiction having been unsettled at the time of filing of the bill.

THIS cause came on before the Lord Chancellor as an original cause.

By an indenture dated the 7th June, 1865, and made between the Defendant, *John Hayward*, who was a coal merchant at *Wellington*, of the first part, the Defendants *W. Thomas*, *E. Miller*, and *G. Wilton*, of the second part, and the creditors of the said *J. Hayward* of the third part, the said *J. Hayward* assigned all his personal estate (except chattels real) to the said *W. Thomas*, *E. Miller*, and *G. Wilton*, upon trust to collect and realize the same, and he declared that the proceeds thereof, and also the proceeds of the sale of his real estate and chattels real (which had been conveyed to the trustees by a separate deed) should be held in trust to be divided among his creditors rateably. The deed contained the usual provisions inserted in creditors' deeds, and also a proviso that, inasmuch as the trustees were themselves creditors, it should be lawful, in any question arising between either of the trustees and the estate, for the two other trustees to enter into any agreement or take any measures for adjusting such claim as effectually as if the trustee interested in such question had not been nominated a trustee.

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(1) Law Rep. 4 Ch. 356.

This deed was duly executed by the debtor and the trustees, and having received the requisite number of assents it was registered under the 192nd section of the *Bankruptcy Act*, 1861.

The Plaintiff was a creditor of *John Hayward* to the amount of £2361, but he was also indebted to him in £2194, leaving a balance due to the plaintiff of £167. In the month of May, 1866, the trustees sent to the Plaintiff an account charging him with a debt of £2537, instead of £2194, which made him appear to be indebted to the estate to a considerable amount, instead of being a creditor to the amount of £167. The error arose from some of the items, amounting to about £343, being charged twice over. The Plaintiff took no notice of the account, or of any of the letters which were sent to him on the subject, but he kept the account, and did not discover the mistake till May, 1867, when he called on the solicitor of the trustees and pointed out the error. In the meantime, the trustees had paid to the other creditors dividends amounting to 9*s.* in the pound, and they had not then sufficient assets in hand to pay the dividend due to him.

On the 5th of August, 1867, however, the solicitor of the trustees wrote to the Plaintiff's solicitor a letter, in which he said:—

"I am instructed by the trustees of this estate to write and inform you that they are willing to allow Mr. *Stone* such an amount of dividend on the balance that may be found due to him from this estate as he would have been entitled to had such balance been adjusted before any dividend had been paid to any other creditors of this estate."

The Plaintiff, however, without taking any notice of this offer, filed the present bill. The bill charged that the trustees had sold the buildings in the railway station yard at *Wellington* in which *Hayward's* business had been carried on, with the stock in trade and goodwill, to one of their number, *William Thomas*, at an undervalue. He charged that the premises, stock in trade, and goodwill, had been valued by a person named *Foote*, at the time of the execution of the deed, at £1297, and had been sold to *Thomas* for £750, and that they had been subsequently resold at a profit to a joint stock company which *Thomas* had formed for carrying on the business.

The bill prayed that the trusts of the deed might be administered by the Court, and that the sale to *Thomas* might be set aside, and the premises resold, and the trustees made liable for any loss occasioned thereby.

The trustees, in their answer, explained that it had been found impossible to sell the buildings by auction, in consequence of their being held on a tenancy at will of the railway company, who had a power of re-entering at any moment, and therefore the Defendant *Thomas* had agreed to take the buildings and business at a fair valuation; and that the reason for the amount being so much less than the value put upon them at the date of the deed was, that a considerable part of the stock had been sold off in the interval. They also stated that the property had been resold to the joint stock company at the same price which *Thomas* had given for it.

The cause was set down on motion for decree before Vice-Chancellor *Stuart*, but in consequence of the case of *Martin* v. *Powning* (1), which had been decided since the bill was filed, it was brought, at His Honour's request, before the Lord Chancellor in the first instance.

Mr. *Dickinson*, Q.C., and Mr. *Begg*, for the Plaintiff:—

There is nothing in the *Bankruptcy Act*, 1861, to oust the jurisdiction of the Court of Chancery in the administration of creditors' deeds, and nothing but express enactment or necessary implication could have that effect. In *Riches* v. *Owen* (2) that jurisdiction was exercised by the appointment of a receiver. In *Martin* v. *Powning* the judgment of the Lords Justices is expressly guarded so as not to decide that the jurisdiction is excluded. That case is only an authority that in ordinary circumstances the Court will not exercise its jurisdiction. It is true that in *Bell* v. *Bird* (3) Vice-Chancellor *Giffard* is reported to have said, that in the administration of the assets the jurisdiction of this Court is excluded. But that was only a *dictum* of the learned Judge. That case came before the Court on demurrer, and the allowance of the demurrer only decided that some special circumstances must be alleged in the bill to induce the Court to exercise its

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(1) Law Rep. 4 Ch. 356.

(2) Law Rep. 3 Ch. 820.

(3) Law Rep. 6 Eq. 635.

L. C.
1870
STONE
v.
THOMAS.

jurisdiction. In the present case there are such special circumstances. We could not have set aside the sale to the trustee in bankruptcy; the Commissioner would have directed us to file a bill in Chancery for that purpose. The Defendants ought to have objected to the jurisdiction by demurrer or answer. It is too late to do so now, when the evidence has been taken and the cause is at a hearing: *Mitford* on Pleading (1).

Mr. *Haddan* (Mr. *Greene*, Q.C., with him), for the Defendants, the trustees:—

With respect to the merits of the case, the evidence shews that the sale to the trustee was perfectly fair, and no profit was made by the resale to the company.

With respect to the jurisdiction, the case of *Bell* v. *Bird* (2) is a distinct authority that the jurisdiction of the Court is excluded. There is no force in the suggestion that relief could not be given in this case in bankruptcy, for a fraudulent sale by an assignee can be set aside by that Court; and the Commissioner has the same powers over the trustees of a creditors' deed as over assignees: *Ex parte James* (3); *Ex parte Lacey* (4); *Ex parte Lawrence* (5); *Ex parte Pilkington* (6). But allowing that there is concurrent jurisdiction in the Court, the case of *Martin* v. *Powning* (7) is conclusive that the Court will not interfere except under extraordinary circumstances; there are no such circumstances in this case. The charges in the bill, even if true, only constitute a matter of account, and could be equally well disposed of by the Commissioner in Bankruptcy: *Thompson* v. *Derham* (8); *Preston* v. *Wilson* (9); *Laycock* v. *Johnson* (10). If the case of *Martin* v. *Powning* had been decided when the bill was filed, we should have raised the question by demurrer or by an answer. But an objection to jurisdiction can be taken at any stage of the proceedings.

Mr. *Dawe*, for the Defendant *Hayward*.

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(1) 5th Ed. p. 176.
(2) Law Rep. 6 Eq. 635.
(3) 8 Ves. 337.
(4) 6 Ibid. 625.
(5) 1 D. J. & S. 307.
(6) Law Rep. 3 Ch. 404.
(7) Ibid. 4 Ch. 356.
(8) 1 Hare, 358.
(9) 5 Ibid., 185.
(10) 6 Ibid., 199.

Lord Hatherley, L.C.:—

This cause has been brought before me as an original cause, in consequence of a supposed variation in the decisions of the Court with respect to the course to be pursued in the administration of the trusts of a creditors' deed, which has been executed and registered with all the formalities required by the *Bankruptcy Act*, 1861, and where the administration can be effectively worked out in bankruptcy.

The deed in the present case is in the common form, except that as all the three trustees were creditors, there is a proviso empowering two of the trustees to settle the debt of the third trustee. But certain circumstances have taken place which are said to be so special as to justify this suit. One of the trustees has purchased a part of the property, and it is charged against him that he bought it at an undervalue, and that this being a purchase by a trustee from himself, the Plaintiff ought to have the ordinary remedy in this Court of setting the purchase aside and having the property resold, and the trustee fixed with the loss if there should be any. That is the principal specialty.

As regards the jurisdiction of this Court, three questions arise: first, whether the Court has any jurisdiction in the case of a creditors' deed; secondly, what special circumstances are required to shew that the Court of Bankruptcy cannot give adequate relief before the Court will exercise its jurisdiction; and thirdly, whether it is not too late in this case to take an objection to the jurisdiction of the Court after the answers have been put in and the witnesses examined.

2 ChD. 5

As to the first question, I feel no doubt that there is jurisdiction in this Court if it thinks fit to exercise it. I do not think that *Martin* v. *Powning* (1) or any other case has decided that the jurisdiction of this Court is ousted by the Court of Bankruptcy. But that case has declared that in the case of a creditors' deed the whole matter has been given to the Court of Bankruptcy, and that it is more convenient that the trusts should be administered there, and that this Court will not interfere unless there are some special circumstances to call for such interference.

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(1) Law Rep. 4 Ch. 356.

L. C.
1870

STONE
v.
THOMAS.

I take it that the rule as to jurisdiction is this: that the jurisdiction of this Court is not ousted unless there is an express enactment in the statute which provides a new jurisdiction. This has been exemplified in many cases in which the Courts of Common Law have had jurisdiction given them, as in the case of discovery, which was formerly exclusively within the jurisdiction of this Court.

The difference between a trust deed and the bankruptcy of a debtor is, that where there is a bankruptcy the whole machinery is in the Court of Bankruptcy, and the jurisdiction of the Court of Chancery is put an end to. The assignees are officers of another jurisdiction. But with respect to trust deeds, the question may arise whether the Court of Bankruptcy has power to give adequate relief in all cases. I take it that in ordinary cases the Court of Bankruptcy is fully adequate to carry into execution the trusts of these deeds, and that the Legislature has given it power to deal with the trustees as with assignees, and the debtor as with a bankrupt; but the Legislature has not thought proper in express terms to oust the jurisdiction of this Court. Where, as in *Martin* v. *Powning* (1), the whole object is to deal with the assets, the Commissioner is perfectly competent, and this Court will refuse to grant relief. But if there is anything *dehors* the administration of the assets in which the Commissioner cannot give adequate relief, recourse may be had to this Court.

The head note of *Martin* v. *Powning* is perfectly accurate when it says that "The Court will not in ordinary circumstances entertain a suit for the administration of the trusts of a deed registered under the *Bankruptcy Act*, 1861." In that case the Court makes these observations (2):—"With respect to the first question, it has been correctly stated by the Respondents' counsel that before the *Bankruptcy Act*, 1861, this Court habitually exercised jurisdiction over composition deeds and trust deeds for the benefit of creditors in the same manner as over other trusts; and in *Riches* v. *Owen* (3), which was a case of a deed registered under the Act of 1861, the Court appointed a receiver, but in that case the deed was a deed of inspectorship, the Plaintiffs were the trustees of the deed, and were suing the insolvent debtor for the purpose of

(1) Law Rep. 4 Ch. 356.
(2) Law Rep. 4 Ch. 367.
(3) Law Rep. 3 Ch. 820.

enforcing the deed against him, and the interference of the Court was limited to the appointment of a receiver for the protection of the property, and we have not been referred to any case, nor do we think that any case can be found in which the Court has entertained a suit for the administration of the trusts of a deed registered under the Act, and in *Bell* v. *Bird* (1) the Court refused to entertain such a suit. The Act of 1861 has placed the trust deeds registered under its provisions in a position widely differing from that occupied by composition deeds and trust deeds for the benefit of creditors under the old law; for by the Act of 1861, if the proper majority of creditors be obtained, and the other requisites be observed, the deed becomes binding on the minority in the same manner as if they had executed the deed (sect. 192); and the 197th section gives to the deed effects similar to those of an adjudication of bankruptcy, and provides that the debtor, the creditors who execute, assent to, or are bound by the deed, and the trustees, shall in all matters relating to the estate and effects of the debtor be subject to the jurisdiction of the Court of Bankruptcy, and have the benefit of and be liable to all the provisions of the Act, and that the creditors and trustees shall have the same 'powers, rights, and remedies' as creditors or assignees in bankruptcy, and that, 'except where the deed shall expressly provide otherwise,' the Court of Bankruptcy shall determine all questions arising under the deed according to the law and practice of bankruptcy, and shall have power to make and enforce all such orders as it might have made if the debtor had been adjudged bankrupt, and his estate were administered in bankruptcy."

Is there, then, anything in this case which would render the relief in Chancery more effectual than in bankruptcy? I have no hesitation in saying that there is not. The facts are simply these:—Two years before the filing of the bill, one of the trustees bought part of the assets, and immediately afterwards sold it to a company. The whole matter resolves itself into a question of account. If it shall turn out that the property was sold at an undervalue, the trustee can be made to account; but there can be no resale, for the company which bought the property are not before the Court. There is no pretence for saying that there is anything in this case

(1) Law Rep. 6 Eq. 635.

which cannot be set right in bankruptcy. But it is said that it is too late for the Defendants now to take the objection. I cannot, however, say that the Defendants were entirely wrong in the course they have pursued. The case of *Martin* v. *Powning* (1) was not decided at the time of the filing of the bill, so that it was not clear that a demurrer would lie. There were also personal charges against the Defendants, which they might think it right to answer. On the other hand, the Plaintiff might have himself stopped the suit when *Martin* v. *Powning* was decided.

I have said that there is nothing to justify the Court in interfering, but I may add that there is much in this case to shew how mischievous its interference would be, and it is clear that the creditors could get no benefit from the suit. The deed in this case was an honest one. Except the present charge, no fault has been found with the trustees. The Plaintiff admits that there is only a balance of about £167 due to him. When the account was sent to him, making him out a debtor to the estate, he did not discover the error in the account for a whole year, and then found out that some items had been charged twice over. In the meantime 9*s.* in the pound had been distributed. Two days before the bill was filed a distinct offer was made him to pay 9*s.* in the pound on what should turn out to be due to him; but without taking the trouble to settle the amount payable, the bill was at once filed.

There has been a great deal of controversy about the valuation. The correctness of *Foote's* valuation is not questioned, and it turns out that the difference of the value put upon the property when the Defendant bought it arose principally from the fact that some of the stock had been sold, so that the undervalue complained of cannot be more than £160. The Plaintiff wishes all this gone into in Chambers, when a single application to the Judge in bankruptcy would have answered all the purpose.

I do not deny that there may be cases in which it may be right to apply to this Court for relief—the appointment of a receiver is such a case—but I think that in general application should first be made to the Commissioner in bankruptcy, and if full relief cannot be so obtained, recourse may be had to this Court.

The bill was quite unnecessary, and must be dismissed; and as there had been an offer made to pay a dividend on the Plaintiff's debt before the bill was filed, I shall dismiss it with costs, which I should not otherwise have done.

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(1) Law Rep. 4 Ch. 356.

L. C.
1870
STONE
v.
THOMAS.

Solicitor for the Plaintiff: Mr. *C. M. Stretton*, agent for Mr. *Loosemore, Tiverton.*

Solicitor for the Defendants: Mr. *T. H. Dixon*, agent for Mr. *Ransom, Wellington, Somerset.*

PEARCE *v.* MORRIS.

L. C.
1869
Dec. 15, 16.

8 Q.B.D. 33

Mortgagee—Payment—Reconveyance.

A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase a part of the mortgaged estate, and has not accepted the title.

On tender by a person having a partial interest giving a right to redeem the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested.

Decree of the Master of the Rolls varied.

BY indentures, dated the 25th of March, 1867, and the 11th of March, 1868, *Robert Arthur Ward* mortgaged a piece of freehold land to *James Crowdy*, and by another indenture, dated the 2nd of April, 1868, he further mortgaged the same piece of land to *Francis Mackay.* About the beginning of 1869 *Ward* and *Mackay* entered into a contract with the Plaintiff *Pearce* for the sale to him of part of the land, and the Plaintiff accepted the title to the property, subject to the confirmation of the purchase by certain persons appearing to be beneficially interested therein. While matters were in this position the three mortgages above mentioned were transferred to the Defendant *Morris.* On the 26th of January, 1869, the Defendant gave notice to *Ward* of his intention to sell the property under the power of sale in the mortgages within a fortnight, or earlier if so advised. Thereupon the Plaintiff tendered to the Defendant the amount demanded by him for principal, interest, and costs, and the Defendant accepted the tender and received the money. The Plaintiff then required the Defendant to convey to

L. C.
1869
PEARCE
v.
MORRIS.

him the legal estate in the mortgaged property, and to deliver up the title deeds, but the Defendant declined to do so, alleging that he was a trustee thereof for the mortgagor and his assigns.

The bill in this suit was then filed by *Pearce* against *Morris* alone, and prayed that the Plaintiff might be declared entitled to have the mortgaged premises transferred to him and the title deeds relating thereto delivered to him, and that the Defendant might be ordered to transfer the premises, and deliver up the deeds accordingly.

There appeared to have been disputes between the Plaintiff and the assignees of other parts of the mortgaged property, and the Defendant was alleged to have refused to convey in order to favour those assignees, but the case was not, in the opinion of the Court, made out against him. The Defendant also undertook by his answer not to part with the deeds until the questions between the owners were determined.

Some time after the bill was filed the Plaintiff accepted the title and took a conveyance, as appeared from an affidavit made in this suit.

The Master of the Rolls made a decree directing the Defendant to convey to the Plaintiff and pay the costs of the suit, as reported (1).

The Defendant appealed.

Mr. *Jessel*, Q.C., and Mr. *Nalder*, for the Defendant:—

No doubt the Plaintiff had contracted to buy a part of this land, but he had only accepted the title subject to confirmation, and might never have become the owner. The decree orders the Defendant to convey the land, without saying that it is to be subject to the equities of redemption affecting it, which cannot be right. Of course any person who is entitled to an interest in any part of the land may redeem, but it does not follow that he is entitled to a conveyance. The Plaintiff does not ask for a transfer but a reconveyance. When the mortgagee has been redeemed he becomes a trustee for all those who have an interest in the equity of redemption: *Cholmondeley* v. *Clinton* (2); *James* v. *Biou* (3). The case of *Wicks* v. *Scrivens* (4) only decided that a tenant for life is

(1) Law Rep. 8 Eq. 217.
(2) 2 Jac. & W. 184.
(3) 3 Sw. 234.
(4) 1 J. & H. 215.

entitled to redeem. The Defendant had notice that there was a contest between the owners of this estate, and could not safely convey to one person only of those who were interested.

Mr. *Southgate*, Q.C., and Mr. *Villiers*, for the Plaintiff:—

Unless the Plaintiff can compel a conveyance, how is he to foreclose or get his money? And how long can the Defendant, who has taken the Plaintiff's money, be allowed to prevent him from getting it back? No doubt there are rights to contribution as between the different owners of this land, but the Defendant has nothing to do with that. He might perhaps have refused to receive the Plaintiff's money, but here he has taken the money and keeps both money and land. The decree does not direct the conveyance to be made in any particular form, but reserves it to be settled by the Judge, and, of course, any necessary reservation of rights will be made. We never claimed to have an absolute conveyance, but if the conveyance was in that form it would not signify, as we should still take subject to all the equities: *Elisha* v. *Elisha* (1) and *Smith* v. *Green* (2) shew what is the form of the decree in such cases. Why should the mortgagee not convey? He has received all he can ever claim, and how would the owners of the other part of the land be injured by the legal estate being conveyed to the Plaintiff.

Mr. *Jessel* in reply.

LORD HATHERLEY, L.C.:—

The authorities have now completely settled what is the proper course to be taken by a mortgagor in asserting his right to redeem and tendering the money, but, of course, if the money is accepted, the thing is carried a step further.

Any person interested in the equity of redemption is entitled to redeem, and when, being so entitled, he tenders the mortgage money and interest, he, having a part in the equity of redemption, is entitled to the delivery of the title deeds, and to have a conveyance of the property. In what form that conveyance shall be drawn depends upon the circumstances. The cases of *Smith* v.

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(1) Set. Dec. 3rd Ed. 475.

(2) 1 Coll. 555.

L. C.
1869
PEARCE
v.
MORRIS.

Green (1), and *Elisha* v. *Elisha* (2), shew how that ought to be dealt with by a tenant for life who takes the conveyance, provision being made reserving any portion of the equity of redemption that he is not interested in, and giving those who are entitled the opportunity at the proper time of coming themselves and redeeming by paying their portion of the debt—a point which I had to consider in the case of *Wicks* v. *Scrivens* (3). The tenant for life having a conveyance and having the deeds cannot be redeemed by those in remainder, but retains the life estate, and when the remainderman comes into possession of the estate he can then obtain a redemption of the charge which the tenant for life had acquired.

Seeing therefore that any person having an interest in the equity of redemption, and having redeemed, is entitled to a conveyance, it is impossible to hold that there must necessarily be a Chancery suit in order to determine who the persons are who are entitled to the other parts of the equity of redemption. All that either the Court or the mortgagee has to attend to is, that in fact the person tendering the money has an interest, whatever it may be, in the equity of redemption. It would be very *mischievous to mortgagees if the Court were to hold that they were bound to inquire into the titles of all the persons who have got other interests in the equity of redemption, or that, if they accepted their money without a suit, it was at their peril, because they had been constituted trustees for other parties. It would also involve mortgagors in a vast amount of litigation and costs, which would be entirely unnecessary in most cases.

A mortgagee, though a trustee when he is paid off by the right person (as in the case of *Cholmondeley* v. *Clinton*) (4), has a plain duty to perform. He is only a trustee for the persons interested in the equity of redemption; and so far as the authorities have gone hitherto, he is not entitled to convey absolutely to a mere stranger to the estate, but is bound to convey to any person having an interest in the estate which gives a right to redeem. Then the mortgagee has to discharge his duty fully by making a conveyance and handing over the deeds to the person tendering him the money.

(1) 1 Coll. 555.
(2) Set. Dec. 3rd Ed. 475.
(3) 1 J. & H. 215.
(4) 2 Jac. & W. 184.

L. C.
1869
PEARCE
v.
MORRIS.

As regards the form of the conveyance, I apprehend it should be drawn in such a manner as that there should be very little difficulty arising upon the subject afterwards, and that there should be expressed on the face of the conveyance a statement of some kind with reference to the exact position of the parties, shewing that the person so redeeming, having only a partial interest, is to hold, subject to the rights of redemption of all the persons who hold other interests. That, I think, should have been stated in the decree, and so far it appears to me that there must be a variation in the decree.

The point which has given me most trouble in the whole case is with reference to the costs of this defendant. The Court always feels reluctant to depart in any way from the course which has been taken in the Court below with reference to the costs; and it is a well-known rule of the Court that if the decree is sought to be varied in respect of costs only, no appeal can lie. In this case the mortgagee was told by the person who tendered the money that he was the owner of a portion of the estate by contract. Of course, the mortgagee is himself in considerable peril if he refuses to accept payment, and I am not saying whether he would or would not be entitled absolutely to refuse in such a case; but if he did so, and it turned out that the person tendering the money was entitled to redeem, then the interest of the mortgagee would at once be stopped. It might turn out, of course, that the person who had entered into this contract might, finally, not become the owner of the estate, because the contract might go off; but he has at the time ground for asserting a right which would entitle him to make a tender, as he did here. But whether he is entitled to have a conveyance, and to have the deeds delivered up until his title is completed, is quite another matter.

It appears to me, upon the best consideration that I can give to the case, that, although he is entitled to tender the money, and although if he turns out ultimately to be the owner, he will be entitled to demand a conveyance and a delivery up of the deeds, yet I do not think that until he is the owner he can be said to have actually got the complete title which is necessary to enable him to demand a conveyance.

It appears to me that this Plaintiff was premature in filing a

L. C.
1869
Pearce
v.
Morris.

bill to have the deeds delivered up to him, and to have a conveyance made to him; though it would be different if it had been proved that the Defendant had threatened to deliver up the deeds to a third person, which was not proved in this case. Moreover, further than that, when the bill was filed the Defendant did what he was bound to do, and undertook not to part with the deeds until the whole matter was determined between the parties.

The case of *James* v. *Biou* (1) has been cited as an authority by the Appellants, who have put their case a great deal too high; but that case only decides that a mortgagee is not bound to accept payment from a stranger who has no title to redeem. I think that the Defendant, having taken the money, is bound now to hand over the deeds to the person who has proved himself to be entitled, but until that proof was made with reasonable certainty he was not bound to hand them over, which was the point decided in that case.

In this case the Plaintiff, when he filed this bill, had not actually accepted the title, and I must hold that in such a state of things he was not entitled to a conveyance, and therefore that the bill was filed prematurely. It appears, however, that the Plaintiff's title has since been completed, and he is therefore now entitled to a conveyance, and to have the deeds delivered to him.

Mr. *Jessel* suggested that it might turn out upon a balance of accounts that there was something due to the vendor, and that the purchaser had no right to have the estate conveyed at all. That is a matter which it appears to me ought not to be entered into, because if that were to be done there could be no conveyance in these matters without a Chancery suit.

The Defendant has certainly placed his rights much too high, and has claimed to hold the deeds and the legal estate as trustee for all parties as they should make out their rights to him; but I cannot lay much stress upon that, considering that the Plaintiff was not in a position to assert his right to that which he claimed, and that matters might well have been left as they were until the Plaintiff had completed his purchase.

Having, therefore, to alter the decree as to the form of the con-

(1) 3 Sw. 234.

L. C.
1869
PEARCE
v.
MORRIS.

veyance, I am able to say that the Defendant, like every other mortgagee, ought to have his costs.

MINUTES.—Vary the decree; tax the costs of the Defendant, and upon Plaintiff paying such costs let the Defendant convey the legal estate in the mortgaged premises, subject as to the portion of the premises in which the equity of redemption is vested in any other person than the Plaintiff, to such equity of redemption; the other part of the decree to stand as before.

Solicitors: Messrs. *Gurney & Co.*; Messrs. *Coverdale & Co.*

BURDICK *v.* GARRICK.

L. C.
and L. J. G.
1870
Jan. 18, 24.

Statute of Limitations — Time of Suing as against Administrator — Agent — Solicitor — Account — Compound Interest—Employing Money in Business —Pleading—Married Woman Administratrix.

An agent who stands in a fiduciary relation to his principal cannot set up the *Statute of Limitations* in bar of a suit for an account by his principal.

An agent, who was a solicitor in *London*, held a power of attorney from his principal in *America* to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account:—

Held, that the agent held the money in trust for his principal, and, therefore, the *Statute of Limitations* was no bar to the suit.

Semble, that if there had been no fiduciary relation between the parties, inasmuch as the agency lasted till the death of the principal, the *Statute of Limitations* would not have begun to run till administration was taken out.

There being no proof that the agent had made any interest or profit by the money in his hands, he was charged with simple interest at £5 per cent.

Compound interest will only be given against an accounting party when he has employed the money in business. *Quære*, whether it can be given without a case for it being expressly made by the bill.

Mixing the money with the ordinary account of a firm of solicitors at a bankers is not such employment in business as will render a member of the firm liable to compound interest.

The decree of *Stuart*, V.C., affirmed with variations.

A married woman administratrix filed a bill by her next friend against an accounting party to the estate of the intestate, making her husband a co-Defendant:—

WN 72 219
5 HL 66
17 Eq 72
20 Eq 727
7 31
15 Ch D 8
17 Ch D 14
18 Ch D 25
258 263
97
21 Ch D 5
522 5

Held, that the other Defendant might have demurred; but as no objection was made till the hearing, the Court allowed the bill to be amended, making the husband and wife co-Plaintiffs.

In re Hindmarsh (1) commented on.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*.

On the 7th of June, 1858, *Percival Egerton Garrick* (since deceased), who was then residing in the *United States of America*, executed a power of attorney appointing his brother *David Garrick*, and his solicitor *John Braddick Monckton*, jointly and severally his attorneys to lease and manage his real estates in *England;* to receive the rents, to sell, and receive the purchase-money for the same; to call in and collect all sums of money and goods due or belonging to him; and to apply and dispose of all moneys which should from time to time come to their hands in the following manner, namely, after paying the costs and expenses sustained by them to keep down interest on mortgages or other debts, to pay mortgages and other debts, to purchase land, and to procure the same to be conveyed to, or in trust for, the said *P. E. Garrick*, his heirs, executors, administrators, and assigns, or to such uses as the attorneys should deem most beneficial to him, and to invest the residue of such money in the securities therein mentioned, either in the name of the said *P. E. Garrick*, or in the name or names of any other person or persons in trust for him.

The power of attorney contained full powers to the attorneys to bring and defend actions, to execute deeds, and to use the name of *P. E. Garrick* as fully and effectually as he himself could; the said *P. E. Garrick* thereby declaring it to be his full intent that all matters and things respecting the same should be under the full management and control of the said *D. Garrick* and *J. B. Monckton* respectively.

Under this power the Defendants in 1858 and 1859 sold *P. E. Garrick's* real estate, and collected his personal estate and received the proceeds, amounting to a considerable sum of money, for a small part only of which they accounted to him.

On the 11th of November, 1859, *P. E. Garrick* died intestate, leaving the Plaintiff, his widow, surviving him.

In January, 1860, the Plaintiff, by her agent in *America*, applied to Messrs. *Monckton & Co.*, the solicitors of the Defendants, of which firm the Defendant *J. B. Monckton* was a member, asking for an account of the estate of *P. E. Garrick*, but Messrs. *Monckton* declined to furnish an account except to the administrator of *P. E. Garrick* legally constituted.

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(1) 1 Dr. & Sm. 129.

S C on applicn to stay proceedgs pendg the appeal
post 453.

In February, 1861, the Plaintiff married the Defendant *Loron Burdick.*

In October, 1867, the Plaintiff took out administration to her former husband *P. E. Garrick.*

The bill was filed in February, 1868, by the Plaintiff by her next friend, charging the Defendant *Monckton* with having made a profit with the money received by him under the power of attorney, and praying for an account of all the dealings and transactions of the Defendants *Monckton* and *Garrick* in relation to the real and personal estate of *P. E. Garrick*, and of all moneys received by them under the power of attorney, and that the Defendants might pay to the Plaintiff what should be found due from them, together with the costs of the suit.

The Defendant *Loron Burdick* was made a co-Defendant. The Defendants *D. Garrick* and *J. B. Monckton* put in answers, in which they explained that their reason for refusing to account when applied to in January, 1860, was that they doubted whether it was true that *P. E. Garrick* had left a widow; and they stated that the money received by them under the power of attorney had been paid into the *London and Westminster Bank* in the name of the firm of *Monckton & Co.*, but they denied that it had been employed by them in any other sense in the way of business, or that any profit had been made by it; and they set up the *Statute of Limitations* in bar of the Plaintiff's claim.

The Vice-Chancellor was of opinion that the *Statute of Limitations* had no application, and ordered an account as prayed by the bill; and, on the ground that the Defendant *Monckton* had mixed the money of his principal with his own, he directed that in taking the account half-yearly rests should be made, and the Defendants *Garrick* and *Monckton* charged with interest at £5 per cent. on the half-yearly balances found to have been in their hands, and that the Defendants should pay to the next friend of the Plaintiff what should be found due from them, together with the costs of the suit.

L. C.
and L. J. G.
1870

BURDICK
v.
GARRICK.

From this decree the Defendants *Garrick* and *Monckton* appealed.

Mr. *Dickinson*, Q.C., and Mr. *G. W. Collins*, for the Appellants:—

The suit is improperly framed. The husband and wife ought to be co-Plaintiffs. The result is, that the decree orders payment to the next friend of the Plaintiff, who can give no discharge for it.

But supposing this difficulty to be got over, the suit cannot be maintained on the merits. The Defendants are agents, not trustees. They had power to invest the money which might come to their hands, but no trust arose until they had actually invested it. The non-investment was merely a neglect of duty on the part of the agent. It was the case of a mere legal demand, which is now barred by the *Statute of Limitations*: *Cadbury* v. *Smith* (1). That statute is applicable to suits between bankers and their customers: *Foley* v. *Hill* (2); and between solicitors and their clients: *In re Hindmarsh* (3).

It is argued by the other side that, supposing the statute applicable, it did not begin to run till the grant of administration. But that is not so, because the cause of action occurred before *P. E. Garrick's* death, and the statute, having once begun to run, could not be stopped by the absence of representatives of either party: *Rhodes* v. *Smethurst* (4); *Freake* v. *Cranefeldt* (5).

Whatever right the Plaintiff may have to an account, the decree is erroneous in directing an account with half-yearly rests. No case is made for interest on the half-yearly balances by the bill, nor is it asked for in the prayer. The Defendants made no profit by the money; it was simply deposited at their bankers: *Attorney-General* v. *Alford* (6); *Blogg* v. *Johnson* (7).

Mr. *Greene*, Q.C., and Mr. *E. P. Hanson*, for the Plaintiff:—

With respect to the frame of the suit, the Plaintiff's husband is before the Court, and is bound by all the proceedings. He is willing to join with the Plaintiff in giving discharges for the money received under the decree.

With respect to the merits of the case, there can be no doubt that wherever a fiduciary relation exists between a principal and his agent, the principal is entitled to an account against the agent as against a trustee: *Attorney-General* v. *Edmunds* (1); *Moxon* v. *Bright* (2); *Makepeace* v. *Rogers* (3); *James* v. *Holmes* (4); and where such fiduciary relation exists, the *Statute of Limitations* does not apply: *Sheldon* v. *Weldman* (5); *Heath* v. *Henley* (6); *Teed* v. *Beere* (7). The ground of the decisions in *Foley* v. *Hill* (8) and *In re Hindmarsh* (9) was, that there was no such fiduciary relation. In the present case the Defendants were in fact trustees, for it was their duty to have invested the money received by them in trust for the principal. Therefore, during the lifetime of *P. E. Garrick* they could not have set up the statute against him; and after his death, although the agency has ceased, the liability to account, on the same footing, remains: *Smith* v. *Pococke* (10). But assuming that the fiduciary relation was determined by the death of *P. E. Garrick*, the statute would not begin to run against the Plaintiff until she took out letters of administration, which was in 1867; for no cause of action could arise until there was some one capable of suing: *Murray* v. *East India Company* (11).

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(1) Law Rep. 9 Eq. 37.

(2) 2 H. L. C. 28.

(3) 1 Dr. & Sm. 129.

(4) 4 M. & W. 42.

(5) 3 My. & Cr. 499.

(6) 4 D. M. & G. 843. 1 Jur. N.S. 361

(7) Law Rep. 2 Ch. 225.

With respect to the interest, agents are on the same footing as trustees for the purpose of charging them with interest: *Earl of Hardwicke* v. *Vernon* (12). The decision of Lord *Cranworth* in *Attorney-General* v. *Alford* (13) has been qualified by his observations in the late case of *Mayor of Berwick* v. *Murray* (14), in which case he gave interest at 5 per cent. against a person in a fiduciary relation to the Plaintiff, although there was no proof that the Defendant had made that interest. But in the present case the Defendant *Monckton* has made use of the money in his business, having mixed it up with the partnership funds. We are, therefore, entitled to interest on the half-yearly balances: *Walker* v. *Woodward* (15); *Jones* v. *Foxall* (16); *Williams* v. *Powell* (17); *Penny* v.

(1) Law Rep. 6 Eq. 381.
(2) Ibid. 4 Ch. 292.
(3) 34 L. J. (Ch.) 396. 11 Jur. N.S. 215
(4) 31 Ibid. 567. 9 Jur. N.S. 553
(5) 1 Cas. C. 26.
(6) Ibid. 20.
(7) 5 Jur. (N. S.) 381.
(8) 2 H. L. C. 28.
(9) 1 Dr. & Sm. 129.
(10) 2 Drew. 197.
(11) 5 B. & A. 204.
(12) 14 Ves. 504.
(13) 4 D. M. & G. 843. 1 Jur. N.S. 381.
(14) 7 Ibid. 519. 3 Jur. N.S. 1,847.
(15) 1 Russ. 107.
(16) 15 Beav. 388.
(17) 15 Beav. 461.

(3) S.C. affd by L.JJ. 11 Jur. N.S. 315. 4 De G. J. & S. 649.
(4) S.C. affd by L.C. 9 Jur. N.S. 733. 4 De G. F. & J. 470

L. C. and L. J. G.
1870
BURDICK v. GARRICK.

Avison (1); *Raphael* v. *Boehm* (2); *Pearse* v. *Green* (3). We admit that we can find no cases where rests have been given, although no interest was prayed by the bill; but in some cases there has been a discussion upon the subject, which could not have taken place unless the Court had jurisdiction to order it, as in *Crackelt* v. *Bethune* (4).

Mr. *Higgins*, for the Defendant *Loron Burdick*, submitted to any decree which the Court might think fit to make.

Mr. *Dickinson*, in reply.

LORD HATHERLEY, L.C.:—

The first objection which has been raised on the part of the Defendants in this suit is as to the form of it. The suit is instituted by Mrs. *Burdick*, as the administratrix of *P. E. Garrick*, seeking to recover money due to her intestate, and instead of her husband joining her as co-Plaintiff he is made a Defendant. We are both of opinion that if the objection had been taken by demurrer, as it might have been, that the Plaintiff's husband in such a case as this ought to be a co-Plaintiff, it would have been successful. But the whole case being now before us, the answer having been put in and the evidence taken, it appears to us that this is very similar to the cases in which a wife has made her husband a co-Plaintiff, although on account of her being solely interested she ought to have been more properly sole Plaintiff; in such cases leave has been given to amend the bill simply by making the husband a Defendant. In the present case, therefore, it being a mere matter of form, we see no objection to directing that the bill should be amended by making the husband a co-Plaintiff, he appearing by counsel at the bar, and submitting to any form of procedure which the Court may think fit to adopt. No doubt we might have directed payment to be made to the Plaintiff and her husband without altering the record, which would have been a sufficient security to the Defendants against any suit to be brought by the husband, but we think it better to direct the bill to be amended.

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(1) 3 Jur. (N.S.) 62.

(2) 11 Ves. 102.

(3) 1 Jac. & W. 135.

(4) Ibid. 586.

With respect to the merits of the case, the point which has been raised in argument is simply this, that the time limited by the *Statute of Limitations* has run out since the last receipt of money by the Defendants as the attorneys of *P. E. Garrick*, such receipt having been in the lifetime of *P. E. Garrick*, and the main question that has been argued is, whether the *Statute of Limitations* applies to the case of persons acting under such a power of attorney as existed in this case. Beyond all doubt this power was in a very large and ample form. This gentleman authorized his attorneys to sell his real estate and collect his personal estate, and he directed that if they thought fit they should invest the money produced by such sale and collection in the funds; or, if they thought fit, they should invest it in real estate. And they had power to vary the securities, and to deal with the fund in any way they thought fit, just as if the principal himself was dealing with it. Besides this, they were to honour his cheques, so that they were obliged to keep a certain sum of money as a balance at the bankers. From all this it is manifest that the fullest confidence was reposed in them for the execution of everything connected with his affairs during his absence. Notwithstanding this, it is contended that these Defendants, acting as they did under a power of attorney, were not trustees but factors or agents. It is not, indeed, contended that as such factors or agents they are not accountable in this Court; but it was contended—and the case of *In re Hindmarsh* (1) before Vice-Chancellor *Kindersley* was relied on more especially for that purpose—that although it was an agency, yet the circumstances were such, particularly with regard to the constitution of the agency, that it would be contrary to the practice of the Court to direct accounts in such a case, and that it could not direct such accounts without defeating the operation of the *Statute of Limitations*.

In the early cases cited by Mr. *Hanson* in his very able argument, a simple appointment of an agent with confidence reposed in him, seems to have been held sufficient by this Court to prevent the *Statute of Limitations* taking effect. It would indeed be a strange

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(1) 1 Dr. & Sm. 129.

5 HL 667
18 Ch D 263

thing if this Court should be obliged to hold that if a person, for instance, were to deposit plate or jewels with his bankers, intending to be absent from home for a great number of years, and those chattels were converted by his bankers to their own use in fraud of the owner, and the owner were to come back after the end of seven or eight years, he is utterly remediless either in the shape of an action at law or of a suit in this Court, because the dealing with his property has been in the nature of an agency. I apprehend that the true rule applicable to these cases is to be found in the case of *Foley* v. *Hill* (1), where it is clearly stated by Lord *Cottenham*, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is intrusted with those funds, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock; and which moneys the factor or agent is bound to keep totally distinct and separate from his own money; and in no way whatever to deal with or make use of them. How a person who is intrusted with funds under such circumstance differs from one in an ordinary fiduciary position I am unable to see. That being so, the *Statute of Limitations* appears to me to have no application to the case.

The case of *In re Hindmarsh* (2) depends upon the special facts disclosed in the report, and in my opinion the demurrer could not be justified if it had been a simple case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding them for the benefit of the person who intrusted him with them. In such a case of agency I apprehend it could not be said that the *Statute of Limitations* was applicable. I do not say that in every case in which a bill might be filed against an

(1) 2 H. L. C. 35. (2) 1 Dr. & Sm. 129.

L. C.
and L. J. G.
1870
Burdick
v.
Garrick.

agent the *Statute of Limitations* would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application.

Another view of this case which has been presented to us appears to me not immaterial. It is said that the agency was a continuing agency, and was not determined until the death of the person who created the agency; for it is clear that the agents were to be employed until the principal revoked the power of attorney, and as it was not revoked in his lifetime the debt would not accrue until after his death. In that case the debt could still be recovered, because letters of administration were not taken out till 1867, and I take the law to be, that if the statute has not begun to run during the lifetime of an intestate, then it does not begin to run until letters of administration to his estate have been taken out. It appears to me, therefore, that the decree of the Vice-Chancellor is perfectly right in this respect.

17 E. 72
15 Ch D 28

Then comes the question of interest. The Vice-Chancellor has directed interest to be charged at the rate of 5 per cent., which appears to me to be perfectly right, and for this reason, that the money was retained in the Defendants' own hands, and was made use of by them. That being so, the Court presumes the rate of interest made upon the money to be the ordinary rate of interest, namely, 5 per cent.

I cannot, however, think the decree correct in directing half-yearly rests, because the principle laid down in the case of the *Attorney-General* v. *Alford* (1) appears to be the sound principle, namely, that the Court does not proceed against an accounting party by way of punishing him for making use of the Plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent., or compound interest, as the case may be. If the Court finds it is stated in the bill, and proved, or, possibly (and I guard myself upon this part of the case), if it is not stated, but admitted on the face of the answer, without any statement on the bill, that the money received has been invested in an ordinary

(1) 4 D. M. & G. 843.; 1 Jur NS 361,

L. C. and L. J. G.
1870
Burdick v. Garrick.

trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made. But how does the case stand here? There is no charge made in the bill of any employment of this money which would produce compound interest; there is an admission in the answer that one of the trustees, being engaged with his co-partner in a solicitor's business, has paid into the common account of the firm portions of this fund. But then it must not be forgotten that a solicitor's business is not such a business as I have described; it is not one in which they could make compound interest on the money embarked, or in which half-yearly rests, or yearly rests, as the case may be, would be made in making up the account. A solicitor's profit arises from the time and the labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor. On the contrary, he is out of pocket for a considerable period by those moneys which he expends, and upon which he receives no interest for, possibly, three or four years. It appears to me, therefore, that no case arises here in which you could say that a profit has been made, or necessarily is to be inferred, and consequently that there was an error committed in directing compound interest. We shall therefore direct the decree to be varied by ordering the husband to be made a co-Plaintiff, and then direct that no compound interest is to be charged. There will be no costs of the appeal, but I think the Vice-Chancellor was correct in saying that the trustees should pay the costs.

Sir G. M. Giffard, L.J.:—

The first question raised on the appeal is a question of form. A married woman sues by her next friend, making her husband a Defendant. If there had been a demurrer put in, there is not the slightest doubt that the demurrer would have been allowed; but, if allowed, leave would have been given to make the Defendant a co-Plaintiff. The Defendants did not choose to demur, but let the case come to a hearing, and no reason has been given why the husband should not be made a co-Plaintiff. I am therefore of

L. C.
and L. J. G.
1870
BURDICK
v.
GARRICK.

opinion that it is quite competent for the Court to direct the husband to be made a co-Plaintiff, and to direct the payment to be made to the husband and wife.

Then comes the question of the *Statute of Limitations*, and in this case it is quite clear that there was, during the lifetime of Mr. *Garrick*, a confidence reposed in the agents on the one hand, and a duty thereupon cast upon the agents, if you call them such, on the other. There was a very special power of attorney, under which the agents were authorized to receive and invest, to buy real estate, and otherwise to deal with the property; but under no circumstances could the money be called theirs; under no circumstances had they the least right to apply the money to their own use, or to keep it otherwise than to a distinct and separate account; throughout the whole of the time that this agency lasted the money was the money of Mr. *Garrick*, and not in any sense theirs. Under these circumstances, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created between these gentlemen and Mr. *Garrick*. I do not think that that trust was put an end to when Mr. *Garrick* died; and I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it. In no case similar to this ought a contrary contention to be raised.

Then as regards the question of compound interest, no doubt the principle applicable to that point was very clearly laid down by Lord *Cranworth* in *Attorney-General* v. *Alford* (1). All that this Court can do as against a Defendant in such a case as this by way of penalty is to make him pay the costs of the suit. The question of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made. If he has applied it to his own use, I think it is quite right to say that he ought never to be heard to say that he has made less than 5 per cent., and that that is a fair presumption to make; but if you seek to go further than that, and to charge him with more than 5 per cent., you must make out a

(1) 4 D. M. & G. 843. 1 Jur NS 361,

L. C.
and L. J. G.
1870
BURDICK
v.
GARRICK.

case for that purpose. In this case there is no statement made in the bill having that object. There is an admission in the answer that the solicitor having an account at his bankers, this money went into his account. Consequently, there being neither proof nor presumption that compound interest was made, in my opinion compound interest ought not to be charged.

Solicitor for the Plaintiff: Mr. *Helsham.*

Solicitors for the Defendants: Messrs. *Monckton & Monckton.*

L. C.
and L. J. G.
1870
Jan. 11.

BOWERS *v.* BOWERS.

Will—Construction—Death coupled with Contingency—Period of Contingency—Survivorship.

11 Eq 226-7
231
12 Eq 144-5,
306-8,
9 Ch 50 n.
7 H L 392
— 412-3
1 Ch D 348
19 Ch D 471

Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—

Held (reversing the decision of *Malins*, V.C.), that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

Richard Bowers, by will, gave his residuary real and personal estate to trustees upon trust to collect and get in the same, "and then to divide the whole unto, between, and amongst my four children, *W. Bowers, Elizabeth,* now the wife of *J. Haigh,* and *H. Bowers* and *R. Bowers,* share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship in case any of them should die without issue; and in case any of my said children should die leaving any child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying, shall go, belong, and be divided between such

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(1) Law Rep. 8 Eq. 283.

L. C. and L. J. G.

1870

Bowers v. Bowers.

children in equal shares, if more than one, and if only one, then the whole to such one and only child."

The testator's four children survived him. This suit having been instituted for the administration of his estate, Vice-Chancellor *Malins*, on further consideration, decided that they became absolutely entitled to their shares, and directed payment to them. Their children, who were parties to the suit, appealed from this order.

Mr. *Pearson*, Q.C., for the Appellants, referred to *Cooper* v. *Cooper* (1); *Farthing* v. *Allen* (2); *Home* v. *Pillans* (3).

Mr. *Shapter*, Q.C., and Mr. *Vincent*, for some of the testator's children; and Mr. *Hardy*, Q.C., and Mr. *J. T. Humphry*, for other of those children:—

There is an absolute gift in fee of the real estate: *Challenger* v. *Sheppard* (4); and as to the personal estate, a gift with a direction to pay. Now, where there is an absolute gift, with a direction to pay out and out, the period during which the gift over may take effect is to be restricted. In *Farthing* v. *Allen* there was a trust for separate use, which shews that payment over of the capital was not intended. The case of *Ware* v. *Watson* (5) is strong in our favour. There is an inclination to restrict contingencies to the period before the time of distribution: *Young* v. *Robertson* (6); *Richardson* v. *Power* (7). Here there is an absolute direction to pay and divide, and early vesting is to be favoured: *Alloway* v. *Alloway* (8). Every contingency is mentioned, and this, according to *Gee* v. *Mayor of Manchester* (9), is the same thing as simply saying, "in case of his death." This case was approved in *Gosling* v. *Townshend* (10), and *Clayton* v. *Lowe* (11) supports the same view. *Woodburne* v. *Woodburne* (12), and *Rogers* v. *Waterhouse* (13), support our contention. As to the

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(1) 1 K. & J. 658. 1 Jur NS 105,

(2) 2 Madd. 310; Jarm. Wills, 2nd Ed. vol. ii. p. 649.

(3) 2 My. & K. 15.

(4) 8 T. R. 597.

(5) 7 D. M. & G. 248.

(6) 4 Macq. 314.

(7) 19 C. B. (N.S.) 780.

(8) 4 D. & War. 380.

(9) 17 Q. B. 737.

(10) 17 Beav. 245, S. C. on. app. 2 W. R. 23.

(11) 5 B. & A. 636.

(12) 3 De G. & Sm. 643.

(13) 4 Drew. 329.

L. C.
and L. J. G.
1870
Bowers
v.
Bowers.

argument founded on the clause of accruer, a similar clause occurred in *Ware* v. *Watson* (1), *Woodburne* v. *Woodburne* (2), and *Young* v. *Robertson* (3), but was held insufficient to vary the construction. The word "shares" means potential shares: *Parsons* v. *Coke* (4); *Re Green's Estate* (5). It is undisputed that in the case of a gift to *X.* for life, remainder to *A.*, and if he dies without issue then over, the contingency extends only over the tenancy for life; and on what possible principle can it be held that if the original gift be immediate, the contingency is unlimited, and extends over the whole life of *A*? *Doe* v. *Sparrow* (6) is an authority for confining it to the death of the testator. There is nothing in this will pointing at investment of the funds, or at payment of interest.

Lord Hatherley, L.C.:—

The subject which is now presented for consideration is by no means a new one. The question has been very frequently before the Court in a variety of forms, and the Vice-Chancellor, in his decision, refers to the different classes of authorities, but he does not seem to give sufficient, or indeed any, weight to the clause: "And in case any of my said children should die leaving any child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying, shall go, belong, and be divided between such children in equal shares, if more than one, and if only one then the whole to such one and only child." The testator first directs his trustees to collect all his property, and then they are to divide the whole—I do not lay any stress upon the word "divide," as narrowing the construction, because although the word "divide" is not so strong as the word "pay," yet it clearly intimates a desire on the part of the testator that there should be a division of his property into shares at his death—they are to divide the whole "unto, between, and amongst my four children, *William Bowers*, *Elizabeth*, now the wife of the said *John Haigh*, and *Henry Bowers* and *Richard Bowers*, share and share alike, as tenants in common, and not as joint tenants, with benefit of sur-

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(1) 7 D. M. & G. 248.
(2) 3 De G. & Sm. 643.
(3) 4 Macq. 314.
(4) 4 Drew. 296.
(5) 1 Dr. & Sm. 68.
(6) 13 East, 359.

6 Jur N.S. 486

12 Eq 304

vivorship in case any of them should die without issue." If the will had stopped there, I confess that there would have been much to be said in favour of the construction which the Vice-Chancellor has adopted, namely, that the survivorship is to be referred, according to the doctrine of *Cripps* v. *Wolcott* (1), to the period of distribution—that is, the gift being immediate, to the death of the testator. Even then I do not think that the matter would be free from doubt, for a reason that I shall presently state. Then the will goes on to provide, by the clause which I have read, for the case of any of the testator's children dying and leaving children; and having regard to this clause, it appears to me impossible, without putting an extremely forced construction on the words, to say that the testator meant this property to pass absolutely to his sons upon his decease. Can it be said that a testator who has so clearly and expressly specified the shares which the children are to take, and then contemplates them as in possession of those shares, and not only of those shares, but also of shares to accrue on the death of other children, means only to define the amount of the share which is, upon the death of the testator, to pass over to the children of a child of his who has died in his lifetime? There have been many cases in which the Court has said that to refer a clause providing for the divesting of a share to the time of the testator's own death, so as to make it merely a provision against lapse, is not a natural construction. It is not *primâ facie* to be supposed that he contemplates the death of the objects of his bounty in his lifetime, but he is to be considered as contemplating their death at some later period, unless he uses language which shews that he is referring to the time of his own death. Take the case of an immediate gift to *A.*, and "in case he shall happen to die" then to *B.* Here death being spoken of as contingent, the testator must be referring to death before some particular period; and as there is no other period to which it can be referred than his own death, we are obliged to treat the gift over as taking effect only in the case of *A.'s* dying in the testator's lifetime. But if the gift over is "in case *A.* shall happen to die leaving issue," we have a contingency, and there is no occasion to confine the death to any particular period. I have had occasion, in *Cooper* v. *Cooper* (2), to

(1) 4 Madd. 11.

(2) 1 K. & J. 658. 1 Jur. N.S. 165.

L. C. and L. J. G.
1870
BOWERS v. BOWERS.

express my surprise at the doctrine laid down in *Clayton* v. *Lowe* (1), that where the testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty —then treat the case as if the gift over were simply "in case he shall happen to die," and restrict the happening of that event to the testator's lifetime, in order to satisfy the words importing contingency. I am glad to find that I have not been alone in this opinion, for the learned Judge who decided *Gosling* v. *Townshend* (2) agreed with me in thinking that course of reasoning fallacious. We were much pressed with the reasoning in *Home* v. *Pillans* (3), that it is not simply in order to satisfy the words of contingency that the period of the death of the testator has been fixed upon as the time to which the death is to be referred, but that there is another rule upon which the Court insists, that the indefeasible vesting is not, without absolute necessity, to be suspended beyond the period of distribution. The Court, no doubt, leans to that construction, but it cannot, on that ground, depart from the plain natural meaning of the words which the testator has used. *Young* v. *Robertson* (4) supports no such contention as that. There a life interest was given, with remainder to *B.* in fee, and it was provided that if *B.* should die before his interest should become vested in him, his interest should go over. The only surprising thing in that case is, that it should have become necessary to carry it to the House of Lords. Here the interests are given in words which it may be at once conceded would, if taken alone, carry the whole interest, and make the estate divisible among the children absolutely. Then there are two classes of contingency contemplated, deaths of children without issue and deaths of children who leave issue; and the plain and natural meaning of the language appears to me to be, that the testator intended to direct a division of his property into as many parts and shares as he had children, with an appropriation of one of those parts to each of those children; but, remembering that each of those children might die either with or without children, he provided that if a child should at any time die without issue, then that child's share or shares should go over to the survivors

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(1) 5 B. & A. 636.
(2) 2 W. R. 23.
(3) 2 My. & K. 15.
(4) 4 Macq. 314.

L. C.
and L. J. G.
1870
Bowers
v.
Bowers.

7 HL 412—414

and that if a child should at any time die leaving issue, then both the share which came to the parent under the original disposition, and the share which might come to him by reason of his being a survivor, should go to his children.

We were referred to *Ware* v. *Watson* (1) as conclusive against this view; but when that case is attentively looked at, I think it will be found to contain nothing to prevent our coming to the conclusion I have stated upon the will now under consideration. Not only had the will in *Ware* v. *Watson* many peculiarities, but Lord Justice *Turner* obviously refers to those peculiarities as the ground of his decision, and I collect from his judgment that he would have come to a contrary conclusion on such a will as that now before us. His Lordship goes carefully through the clauses of the will, by which the testator directed his property to be divided into six equal shares, one of such shares to be for the benefit of each of his children, stating the number of his children then living to be six, and so shewing that the will was made with reference to the existing state of the family, and then directed the the shares of sons to be transferred and assigned to them as soon as conveniently might be after his decease; and as to his daughters, that their shares should be vested interests respectively for their respective benefits, in manner thereinafter mentioned, immediately upon or after his decease. There was a proviso by which the testator declared that if any of his sons should die without having any issue living at his decease, or born in due time afterwards, the share, both original and accrued, of each son so dying should go to the survivors of the testator's children. Then the executors were to stand possessed of the property of the daughters upon certain trusts for investment. His Lordship, after observing upon these provisions, states the result as follows (2): "Looking at the expression 'then living,' and the distinction between the trusts for the sons and daughters, and the whole language of the trust, I am of opinion that there is in the will enough to control the general effect of the proviso, and to shew that the intention of the testator was, that the sons should take both their original and accrued shares absolutely." It appears to me that the Lord Justice *Turner* carefully bases his decision upon various circumstances, not one of which exists in the present case, and relies on them as modifying the effect which must otherwise have been given to the proviso—a proviso substantially the same as that which is found in the present case, unaccompanied by any one of those modifying circumstances. I cannot come to the conclusion that the testator here intended only to deal with potential shares with reference to events occurring in his own lifetime; he appears to me plainly to have intended to deal with shares actually vested in his children. The interests of the children are not by this construction cut down to mere life estates, for if all of them were to die without issue the last survivor would take the whole absolutely, the absolute gift to him not being divested, for the gift over could not take the property out of him, there being no survivor in whose favour it could operate. It appears to me that whatever doubt there might have been if this will had stopped short at the end of the clause providing for the death of children without issue, is removed by the clause which immediately follows. The funds, therefore, must be held in trust until the contingencies are determined, and the shares must be carried to a proper account, with directions in each case to pay the income to the child for the present entitled to such share.

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(1) 7 D. M. & G. 248.

(2) 7 D. M. & G. 259.

SIR G. M. GIFFARD, L.J.:—

In this case it appears to me that the Vice-Chancellor has failed to lay sufficient stress upon the context. He has laid down a general principle and then proceeded upon it, without having sufficient regard to the expressed intention of the testator. The context of the will in *Ware* v. *Watson* (1) was very different from that of the will in the present case, and I see nothing in that case opposed to the view which the Lord Chancellor has taken of the true meaning of this will. If we take the whole together, first of all there is, no doubt, an absolute gift to the trustees, with a direction to get in the money and securities, and divide the whole among the testator's four children as tenants in common, with benefit of survivorship in case any of them should die without issue. But the will does not stop there; the testator goes on to say: "And in case any of my said children should die leaving any child or children, then I direct that the share, whether original or accruing, of him,

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(1) 7 D. M. & G. 248.

L. C.
and L. J. G.
1870
Bowers
v.
Bowers.

her, or them so dying, shall go, belong, and be divided between such children in equal shares if more than one, and if only one, then the whole to such one and only child." It is obvious that every one of those expressions relates to the direction to divide, and that the direction to divide is not to be construed as a direction to divide immediately among the four children, but to divide, among the four children in manner thereinafter mentioned, that is, subject to the following provisions. There is quite enough to cut down that which, taken by itself, might be considered as an absolute and complete gift.

I do not think it necessary to go through the cases, but I may say that I quite agree with what has been laid down by the Master of the Rolls in *Edwards* v. *Edwards* (1), in which these cases were much considered. His Lordship there did not dissent from *Farthing* v. *Allen* (2), from the decision in which I do not see any reason to dissent now.

7 H L 413
12 Eq

Some discussion then took place as to the form of the order to be made, and their Lordships determined that the order ought not to declare the future rights, but declare negatively that the children were not entitled to their shares indefeasibly, but took the same subject to the limitations contained in the will.

Solicitors: Mr. *R. Metcalfe;* Messrs. *Bell, Brodrick, & Gray.*

PIKE *v.* NICHOLAS.

L. C.
and L. J. G.
1869
Nov. 17, 18,
22, 23, 24.

[illegible]

Copyright—Piracy—Older Writers—Theory.

The Plaintiff published a book, and the Defendant afterwards published a book on the same subject, in which he mentioned the Plaintiff's book as one of the authorities consulted by him. The Plaintiff alleged that the Defendant's book was a piracy, and in proof shewed (amongst other things) that the Plaintiff had referred to a large number of authorities to which the Defendant had referred. The Defendant stated that he had taken the references from a previous writer from whom the Plaintiff had taken them, and shewed that he, the Defendant, had referred to two authorities not mentioned by the Plaintiff; but as to two of the authorities referred to by the Plaintiff, and

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(1) 15 Beav. 357.

(2) 2 Madd. 310.

L. C.
and L. J. G.
1869
Pike
v.
Nicholas.

Pari. 284-87
[illegible]
10 C.P. 576-8,
2 C.P.D. 43-4
[illegible]

also by the Defendant, the Defendant was unable to state where he had found them:—

Held, that, under the circumstances, the Defendant had not made such use of the Plaintiff's book as to entitle the Plaintiff to an injunction.

An author who has been led by a former author to refer to older writers, may, without committing piracy, use the same passages in the older writers which were used by the former author.

An author has no monopoly in any theory propounded by him.

Decree of *James*, V.C., reversed.

THIS was a suit to restrain an alleged piracy of the Plaintiff's book.

In 1865, a prize of 100 guineas was offered by the *National Eisteddfod* at *Aberystwith* for the best essay in English, Welsh, French, or German, on "*The Origin of the English Nation, with reference to the Question how far that Nation is descended from the Ancient Britons.*"

The Plaintiff, who is a barrister, and has devoted himself to literary and scientific pursuits, and especially to the study of anthropology, sent in an essay, as did the Defendant also. No prize was awarded by the arbitrators, but two of them expressed a hope that the essay sent in by the Plaintiff would be published; and in May, 1866, the Plaintiff published his essay in a revised form under the title "*The English and their Origin; a Prologue to Authentic English History.*"

The same prize was offered in the following year. The Plaintiff did not compete, but the Defendant, on the 2nd of July, 1866, sent in an essay.

No prize was awarded; but the Defendant determined to publish his essay, and in 1868 it was published, partly by subscription, under the title "*The Pedigree of the English People.*" The book was divided into three parts, viz.: Part I. Introductory. Part II. The Invasions of *Britain*—The Elements of Admixture of Race accumulating—Admixture commencing. Part III. The Argument for Admixture of Race—The Question "To what extent is the English Nation of Celtic Origin?" The Plaintiff, having come to the conclusion that an unfair and illegitimate use had been made of his work, filed his bill to restrain the Defendant from printing, selling, or disposing of any copies of the book entitled "*The Pedigree of the English People,*" containing the Third Part thereof. The bill alleged that nearly the whole of the argument contained in the Third Part of Defendant's book was copied from, and a piracy of, Plaintiff's book; and that Defendant had made an unfair and illegitimate use of Plaintiff's book, so that the book of the Defendant did not constitute, as it professed to do, an original work.

The Plaintiff and Defendant each set out a long list of authorities consulted by him, and in the Defendant's list the Plaintiff's book was included; and it was expressly referred to in the text, and spoken of as displaying "much acuteness and scholarly acquirement." *Pouchet's* work, mentioned by the Vice-Chancellor *James* in his judgment, was included in both lists, but was not further referred to by either Plaintiff or Defendant.

In order to shew the identity of plan between the Third Part of the Defendant's book and the Plaintiff's book, the following statement of the headings of the chapters was set out in the bill:—

Plan of the Plaintiff's Book.	*Plan of Part III. in the Defendant's Book.*
CHAPTER I. The Historical Evidence.	CHAPTER I. The Historical Argument.
CHAPTER II. The Philological Evidence.	CHAPTER II. The Evidence of Philology.
	CHAPTER III. [The Evidence of Topographical and Personal Names.] Same Subject continued.
	CHAPTER IV. [Evidence of the Influence of the Ancient British Race upon the Anglo-Saxons supplied by the Development of Early English Law.] Development of Early English Law.
CHAPTER III. The Evidence of Physical Characteristics.	CHAPTER V. [The Evidence supplied by the Physical, Mental, and Moral Qualities of the English.]
CHAPTER IV. The Evidence of Psychical Characteristics.	Sect. 1. Evidence of Physical Characteristics. [Physical Characteristics of the English People.] Sect. 2. Evidence of Mental and Moral Characteristics. [Mental and Moral Characteristics of the English People.]

L. C. and L. J. G.
1869
PIKE v. NICHOLAS.

The headings, however, thus given in the bill, were not exactly the same as those which appeared in the Defendant's book, as inclosed in brackets in the above table.

None of the passages alleged to have been copied were set out in the bill.

The Defendant, by his answer, denied piracy, or any unfair or illegitimate use of Plaintiff's book, or that the "*Pedigree of the English People*," was not an original work. He stated that the arrangement of Part III. of his book was substantially the same as that which he adopted in the essay submitted by him for competition at the *National Eisteddfod*, in 1865; moreover, that the arrangement of Part III. was, with the exception of the historical argument, the same as that which he adopted in the second essay sent in in 1866. He also stated that the MS. from which his book was printed, with certain exceptions, was *verbatim* the same MS. as that which was sent to the *Eisteddfod*, in 1866, some months before he had ever seen or heard of the publication of Plaintiff's work. The historical and philological chapters of Defendant's book were stated to be entirely due to his independent and original labour and research, which last had occupied him continuously for two months and upwards. With respect to the resemblance between the Plaintiff's book and the third part of Defendant's book, in the chapter relating to physical characteristics, it was stated (in the answer) to arise from the use by both of the same sources and materials (which were specified in the answer). The Defendant stated that the Plaintiff's book was not consulted by him until his MS. was, in substance, prepared for publication, and for the purpose only of comparing the same with his own MS., which was then substantially finished, and that his MS. was not substantially added to, or altered, after, or in consequence of, his having so consulted the Plaintiff's book.

Both Plaintiff and Defendant were cross-examined, and the result of that cross-examination, and of the evidence, as affecting the Defendant's case, and the principal alleged instances of plagiarism, are fully stated in the judgment of the Vice-Chancellor *James*, as given below, and in the judgments of the Lord Chancellor and Lord Justice *Giffard*.

The Vice-Chancellor *James* granted an injunction, and ordered the Defendant to pay the costs of the suit and damages; the damages being the value of every copy of the Defendant's book sold, as if it had been the Plaintiff's (1).

L. C. and L. J. G.
1869
Pike v. Nicholas.

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(1) 1869. May 24.

Sir W. M. James, V.C.:—

In this case the Plaintiff complains that the Defendant has piratically availed himself of his (the Plaintiff's) literary labours so as to be an infringement of his copyright. The Plaintiff is the author of a work called "*The English and their Origin*." After this work had been published and given to the world, the Defendant published another work, called "*The Pedigree of the English People*." The Plaintiff says, in substance, this: "I wrote my book in support of a theory that the English are not, as generally supposed, mainly and substantially of Anglo-Saxon or Teutonic race, but that, on the contrary, they are plainly and substantially of the old Celtic race, the same people which possessed this land before the invasion of the Romans. I proceeded," he says, "to consider the subject under the heads of—1. The Historical Evidence; 2. The Philological Evidence; 3. The Evidence of Physical Characteristics; 4. The Evidence of Psychical Characteristics." The Defendant has pursued in the third part, which occupies by far the greater portion of his book, precisely the same plan, with this difference, that he has added a chapter on English law; that he has made a separate chapter of the evidence of topographical and personal names, and that for the word "psychical" he has used "mental and moral." The Plaintiff says, "that plan, which is in substance identical with mine, is copied from mine." He further says: "It was necessary to my argument to get rid of a good deal of what had been taught us as history of the Anglo-Saxon invasion, and I accordingly proceeded to shew that the stories of *Hengist* and *Horsa*, of *Vortigern* and *Vortimer*, of the complete expulsion of the British race by the Saxon invaders, were mythical. In the investigation of that subject I traced the whole of what has passed for history to *Gildas*, and I proceeded to inquire to what extent, according to the canons of modern historical criticism, reliance could be placed on the narrative of *Gildas*, and I came to the conclusion on several grounds that the narrative is wholly untrustworthy. In the Defendant's book I find that he adopts exactly the same course of argument—the early history treated as of the same legendary character. I find it traced to *Gildas* as the sole foundation for it. I find the authority of *Gildas* then tested by the same canons, and the same conclusion which I had arrived at also reproduced, and on the same or substantially the same grounds. It is not only the logic which is the same, but the rhetoric shews most singular coincidences."

His Honour referred to the following passages from the works of the Plaintiff and Defendant:—"There are probably few educated Englishmen living who have not in their infancy been taught that the English nation is a nation of almost pure Teutonic blood, that its political constitution, its social customs, its internal prosperity, the success of its arms, and the number of its colonies, have all followed necessarily upon the arrival in three small vessels of certain German warriors under the command of *Hengist* and *Horsa*. *Hengist* and *Horsa* are a necessary part of a child's education, so are *Rowena* and *Vortigern* and the Heptarchy, and many other pretty

The Defendant appealed.

The Defendant and the Plaintiff appeared in person on the appeal.

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stories, which have found their way under the disguise of facts into respectable histories. The press even now seems generally to assume that the ordinary Englishman does not carry his historical criticism beyond the point which it reached in his childhood, and a *Cambridge* professor of history does not scruple to dilate upon the merits of 'our Teutonic race.'" (*Pike*, pp. 15, 16.)

In the Defendant's book there are these words:—"Before proceeding further, it is necessary to search into the foundations of the popular belief respecting the state of the Britons at the crisis of the Anglo-Saxon invasion, and their complete expulsion by that invasion from the soil of *England*. That belief is to the effect that the Britons after the departure of the Romans were in a completely prostrate condition, were incapable of offering resistance to Picts, Scots, or Saxons, and were ruthlessly mown down by the sword without deliverance, a small 'remnant' only barely escaping, like sheep from the jaws of devouring wolves, into the mountains of the west, or as miserable fugitives across the sea to *Brittany*. This belief, instilled to this day alike into the child's mind in the nursery and the student's in the lecture-room, is, in all probability, as palpable a superstition, as devoid of foundation, as gratuitous and as impossible of rational credence, as any wild and idle romance ever imposed upon unsuspecting childhood." (*Nicholas*, pp. 245, 246.)

The Plaintiff further says:—"I took especial pains with respect to certain physical characteristics, the colour of the hair and the form of the skull. I said that there was a popular theory starting with two assumptions: 1. That the Anglo-Saxons were a fair-haired, red-haired, or flaxen-haired people. 2. That the English are a fair-haired, red-haired, or flaxen-haired people. I proceeded to demolish both these assumptions. The Defendant has done the same. As to the second assumption, I proceeded to give the results of my personal examination of 4848 heads in *London*, and proceeded further to shew from the population abstracts that *London* might be considered a fair representative of the whole of *England*—that it is peopled not exclusively by Londoners, but by natives of all parts of the country. I find," the Plaintiff says, "in the Defendant's book a similar statement of identical results of personal investigation; and, what is very extraordinary, I find that though the Defendant's results are given as arrived at both in *London* and the north of *England*—6,000 in the one and 5,000 in the other—he, too, proceeds to shew, and to shew from the population abstracts, that the population of *London* is drawn from all parts of the island. I proceeded," the Plaintiff says, "to ascertain what was said by ancient authors, and with what qualifications these statements were to be received as to the hair, colour, eyes, and complexion of the ancient inhabitants of these islands, the Gauls and the ancient Germans. The Defendant has referred to the same descriptions, and made the same qualifications. For example, I pointed out that when *Tacitus* and other writers asserted that all the Germans had blue eyes and *rutilæ comæ*, it was to be noted that the Greeks and Romans were generally dark-haired, and may have regarded fair hair as a rare and great beauty, and may have been

LORD HATHERLEY, L.C., said that their Lordships did not intend to lay down any general principles which were contrary to those

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struck by a proportion of light hair greatly in excess of that which they found among themselves. Again, having premised that the passages in which the Gauls or Celts are described have been carefully collected by *Prichard*, I made a comment on the passage quoted by *Prichard* from *Livy*, that the expression was '*rutilatæ comæ*,' and not '*rutilæ comæ*,'—'reddened,' not 'red.' Having come to the conclusion that the Gauls were in the habit of dyeing their hair of a lighter hue, I made a passing reference to the alleged custom now prevalent in *France* and *England* of dyeing the hair red. The Defendant has made the same fashion the subject of a rhetorical paragraph. I referred to a passage in *Suetonius*, in which it is stated that certain Gauls were compelled by *Caligula* to make their hair light or red, and to learn German. The Defendant refers to the same passage. I referred to a passage in *Strabo*. The Defendant has referred to the same passage." Then the Plaintiff says, "I applied myself to the consideration of the evidence afforded by the *cranium*, and after the examination of the authorities I arrived at the conclusion that the old Celtic skulls were, in the great majority, long oval, and singularly like the Greek skull. I proceeded to shew that the modern English skull is long oval, and that the modern Teuton skull is, on the whole, round and short, and came to the conclusion that all the evidence, without exception, points to the Cymry as the progenitors of those English people who possess the longer oval skull, and who constitute the bulk of the nation. The Defendant has come to the same conclusion from the same premises." The Plaintiff says, "In arriving at that conclusion, I referred to the work of the Swedish author, *Retzius*, for his conclusion that the long oval skull found in the ancient burying-places of *Denmark* were the skulls of the Cimbri, who at one early time had dwelt there in no inconsiderable numbers, and I made a long quotation from him, in which he calls the long oval form the true Celtic, and speaks of 'a shorter oval form with the sides more arched, which is Norman, and is closely allied to the German.' The Defendant gives in substance exactly the same things from *Retzius*."

These are some, and some only, of the points to which the Plaintiff's counsel has drawn my attention. I have read both the books carefully in the parts complained of, and if the matter rested on a comparison of the two works I could have no doubt whatever that the Defendant's work was in these parts a palpable crib from the Plaintiff's, transposed, altered, and added to—to use the words of Lord *Strangford's* award, "essentially, indeed, typically, second-hand, run off easily from the pen by a well-trained writer"—a writer, I would add, skilful in appropriating the labours of another, and in disguising, by literary artifices, the appropriation. But the Defendant has pledged his oath to this, that his work is an independent work, written substantially before he had seen the Plaintiff's work, and that the resemblances are due to the nature of the subject—to the object, which was common to both, of establishing for the ancient British a large share in the production of the great British nation of the present day—to the obvious nature of the topics which such an object would suggest to any persons who laid down by the Vice-Chancellor. Where their Lordships differed from him was merely in the application of those principles to this

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had followed the course of modern historical criticism, and of ethnological and anthropological research and speculation, and the like obviousness of the authorities which such persons would refer to and quote. His answer contains the following passage :—

"I say that the MS. from which my said book was printed, with the exception of Appendices *A*. *B*. and *C*., which I afterwards inserted at the suggestion of Professor *Max Müller*, and of the index, and of some additional sentences and notes, principally suggested by Professor *Max Müller* and Dr. *Rowland Williams*, is *verbatim* the same MS. as that which I submitted for competition at the *Eisteddfod* in 1866, some months before I had ever seen or heard of the publication of the Plaintiff's work."

His Honour proceeded: The Defendant has been examined and cross-examined before me at considerable length. He adheres to his statement in the answer, with one most notable exception. He now states that the whole chapter about *Gildas* was written, or, as he calls it, re-written, after he had seen the Plaintiff's book, and after the MS. had been submitted to Professor *Max Müller* and Dr. *Rowland Williams*; and he, not an illiterate man, but an author accustomed to test the weight of historic texts, can give no further explanation of the deliberate and emphatic statement quoted from his answer than that it is stronger than his instructions to his solicitor went. It has been pressed on me that I cannot decide against the positive oath of the Defendant without convicting him of wilful and corrupt perjury. I have had occasion more than once to say that this is not a criminal Court; that I am trying no one for any crime; I am here bound by my own judicial oath to well and truly try the issue joined between the parties, and a true verdict give according to the evidence: that is to say, according as I, weighing all the evidence by all the lights I can get, and as best I may, find the testimony credible or incredible, trustworthy or the reverse. The law which admitted the testimony of the parties and of interested persons was passed in full reliance on the Judges and on juries that they would carefully scrutinize such testimony, and would give it such weight as it deserved and no more, or no weight at all. Is the result of the Defendant's examination or cross-examination such as to enable me to place reliance on his story? To begin with, I have read carefully through the whole of the notes marked *A*. and *B*. which were the materials for his first essay, and I am satisfied that he had not at the time he wrote them the remotest idea of that which is now found in the parts of his book complained of. To the author of *A*. and *B*. the common school histories of *England* were genuine history. *Hengist* and *Horsa*, *Vortimer* and *Vortigern*, were historic persons. There is no trace whatever of the sceptical criticism which will have it that the whole of that history, fit only for the nursery, is to be carried back to *Gildas* only, and that *Gildas*, if not himself a mythical or shadowy personage, is a historic witness wholly untrustworthy. Indeed, the author was so little versed in the subject that he talks of *Gildas* copying *Bede* and putting in darker colours. There is no trace whatever in these notes of the examination of the ancient authorities as to hair and complexion

L. C.
and L. J. G.
1869
Pike
v.
Nicholas.

particular case. A case of alleged piracy like this was obviously very difficult to determine when the authors took a common

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of Britons, Gauls, and Germans, and of the numbering of the colours and shades of hair of the present people of the country. There is no trace whatever in these notes of the examination of the evidence afforded by ancient skulls, and of the comparison between that evidence and the results of a careful examination of the existing types of modern heads, English and German. The Plaintiff says, "If you did not take all this from my book, tell me where you took it from. Where are the materials from which you elaborated it?" The Defendant is unable to say when or where he gathered the materials, or when or where, indeed, he wrote any part of his present essay. The collection of materials for a genuine literary work is a thing of time and labour. You cannot walk by instinct to the proper shelf of a library, take down the right book, open it at the right page, and hit on the right passage, and just the book, the page, and the passage which somebody else has found before you. The Defendant has not a single rough note to produce, no trace of his quarrying in the *British Museum*, or any other like quarry, from which the stones of the literary edifice were to be built up. I have his diary before me from February, 1866, up to the 2nd of July, where it is noted that the prize essay of above 800 pages was sent in. Up to the 17th of May he seems to have been incessantly travelling and canvassing, and certainly does not seem to have had either time, or opportunity, or means, for any such literary investigation or labour, nor is there any trace of any such work. On the 18th and 19th of May I find an entry: "At *Caermarthen*, writing prize essay." A similar entry, in *London*, 25th and 26th, and again, on the 5th and 6th of June, 8th, 9th, 11th and 12th, and on the 13th, "Finish writing ditto." On the 14th—23rd, "revising essay," which is the only light the diary throws on the subject. It is certainly very singular that an author should not be able to give a single place or time when or where he consulted a high authority, and that he should not be able to produce a single original note, extract, or quotation. Then there were some special matters on which he was especially pressed:—"You have quoted *Retzius*, where did you find him?" "I cannot say." "You have quoted *Georges Pouchet* ('*Pluralité des Races Humaines*,' *Paris*, 8vo., 1864), where did you find him?" "I cannot say." It is to be observed that these books are not in the *British Museum*. Again, he was asked about the public meetings at which it is stated in the book that 10,000 complexions had been marked for the purposes of of this essay, with the detailed figures of the results obtained, "Can you produce the times and places of these meetings?" He is again unable to fix time and place. I have been, therefore, obliged to arrive at the conclusion that the account which the Defendant has given of his composition of his work in the matters complained of is not probable, is not credible, is not trustworthy; and the result of his answer, his examination, and his cross-examination, on my mind, so far from displacing, has confirmed the conclusion produced by the internal evidence and the comparison of the two works. This conclusion, however, is not sufficient to dispose of the case. Plagiarism does not necessarily amount to a legal in-

L. C.
and L. J. G.
1869
Pike
v.
Nicholas.

subject and depended upon authors open to both of them, and when portions of the one work, which were said to resemble portions of the other work, might be taken from those common authors to which each was at liberty to resort.

First: There was a common subject, which it was very important to bear throughout in mind in the consideration of this case. The subject was probably suggested to the minds of both these gentlemen by the prize which was offered by the Committee of the *National Eisteddfod* for the best essay on "*The Origin of the English Nation, with reference to the Question, how far that Nation was descended from the Ancient Britons.*" This question admitted of only two opinions: the one being that we were in a scanty degree descended from the Ancient Britons; the other, that

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vasion of copyright. A man publishing a work gives it to the world, and, so far as it adds to the world's knowledge, adds to the materials which any other author has a right to use, and may even be bound not to neglect. The question, then is between a legitimate and a piratical use of an author's work. In considering this I have not been unmindful of the small comparative extent of literary composition which is traceable from the one to the other; I have not been unmindful that there was some not immaterial exercise of literary labour and skill in the transfusion and transposition which I have held to have been made, and I have endeavoured to guard myself against any prejudices derived from my hostile conclusions against the Defendant which I have stated. I have considered it as if the Defendant had openly borrowed from the Plaintiff's book, and had candidly acknowledged the source. And I think there is a good deal which he might have done, so doing it. There is no monopoly in the main theory of the Plaintiff, or in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations. But the Plaintiff has a right to say that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication. That the part taken in this case is material and is substantial is clear upon the Defendant's own statements.

The Plaintiff, therefore, has, in my judgment, made out his case, and he is entitled to an injunction to restrain the publication of the book in its present state, or of any book containing the 7th section of Chapter I. of Part III. or sect. 1 of Chapter V. of Part III., and to an order for the cancellation of those parts. He is entitled to his costs of the suit, and to an account and payment of his damages. And my view of the damages in cases of literary piracy is, that the Defendant is to account for every copy of his book sold as if it had been a copy of the Plaintiff's, and to pay the Plaintiff the profit which he would have had received from the sale of so many additional copies, and I adhere to that mode of assessment.

L. C. and L. J. G.
1869
PIKE v. NICHOLAS.

we were chiefly descended from them. And perhaps it was not taking too great a liberty with either of these two gentlemen to say, not that their minds would be biassed by the question being propounded to them by a Welsh Society, but that, if they had not been of that opinion which it was most likely a Welsh Society would entertain, they probably would not have been competitors for the prize.

Accordingly as was to be expected, the writers of both these treatises took exactly the same view in this respect; namely, that the Ancient Britons largely preponderated as an element of the English nation. That being so, each of them would naturally begin to look about for the authors bearing on this question. Supposing them *bonâ fide* about to produce an original work, they would naturally look out for all the older authorities who had written upon the subject. There were a variety of authors on the subject, especially Dr. *Prichard,* to whom, in the first instance, both of them would have recourse. They referred to those authors who discussed the evidence of the origin of the present races; namely, existing histories which had come down to us of the adventures of these races; the existing evidence of language, which had been traced with so much skill by a variety of authors, both here and on the Continent; the existing physical characteristics, and the existing customs and habits of life. Those four characteristics would be found in *Prichard,* and in almost every author who had taken upon himself to write on national origin, as traceable in the existing inhabitants of a country. Therefore, before approaching the question whether or not one author had taken from the other, it must be borne in mind that a great deal of similarity would naturally be found in the works of authors writing on such subjects as these.

Then, secondly, as to the common sources: When once it was established that there were common sources, it would be naturally expected that there would be great similarity in the statements of the facts which were narrated from those common sources. Accordingly, there might be traced, throughout the work of the Defendant, a great similarity to the outline and plan of that of the Plaintiff. With regard to that part of the case, His Lordship thought that the Vice-Chancellor had laid a great deal too much stress upon the fact of the divisions of the subject in the Defendant's work being similar to the divisions of the subject in the Plaintiff's work. In the MSS. of the original treatise, marked *A.* and *B.*, so far as it was called original by the Defendant, these very divisions were set out, and very naturally, regard being paid to all that had been written by authors on this subject; and it must be taken that the Defendant, in his first treatise, which he sent in for competition in 1865, before he could possibly have seen the Plaintiff's treatise, had originated a division which was proper and peculiar to a subject of this character.

Then, as regards the common sources, when once it was established that there were common sources upon a particular subject, it amounted to nothing at all for the Plaintiff to say, "The Defendant has cited author after author who have been cited by me;" because, when the common sources were referred to, it would be found that they both got them from the same common sources. Therefore, it was most probable, when they were each treating of a particular subject, that they should take all the passages from those common sources which would assist them in the development of the subject which they were treating of; and to find *Suetonius*, *Tacitus*, *Cæsar*, and so on, cited in the one book and in the other, really came to nothing when it was found they were both citing the identical passages for the most part to be found in Dr. *Prichard's* book, to which both had had recourse.

The Plaintiff further alleged that the Defendant had copied a passage in which the Plaintiff quoted a Greek author, *Xiphilinus*, but it was impossible for the Court to fix upon the Defendant a quotation as derived from the Plaintiff's work, simply because the Plaintiff, having quoted *Xiphilinus*, who describes *Boadicea* as having yellow hair, the Defendant said there were authors who called her golden-haired.

On the other hand, the Defendant had quoted an author taken from *Prichard*, *Calpurnius Flaccus*, who was not quoted by the Plaintiff, and had added to his quotation a passage from *Tertullian* which was not inapt to the subject. These circumstances shewed clearly that the Defendant went to the original source, namely, *Prichard*, and that he got those quotations from *Prichard* which the Plaintiff got from *Prichard*.

Although the Defendant might have been led to look more minutely into *Prichard* than he otherwise would have done by referring to the Plaintiff's work, still the Plaintiff could not say, "I, having found these passages in *Prichard*, will prohibit all the world, who may find the same passages, from making use of them." The moment he had given that degree of light to the Defendant which led him to refer to that common source, if the Defendant did really and *bonâ fide* look at that common source, he did all that this Court required him to do. He must not simply copy the passage from the Plaintiff's book, but having been put on to the track, and having looked at that particular part of the book which the Plaintiff led him to, he was entitled to make use of every passage from that author which the Plaintiff had made use of. Perhaps it was not doing the Defendant quite justice to say that looking into *Prichard* was wholly suggested to him by the Plaintiff's book, because in the manuscript this note is found, "See *Prichard*." although he did not mention the volume or part of *Prichard* which had a bearing upon this subject.

This really removed a vast portion of the evidence which seemed to have impressed the Vice-Chancellor forcibly. The Vice-Chancellor said: "Here is a common plan; here is a common origin; the Plaintiff has got this plan; the Defendant has got this plan; the Plaintiff has these citations from these authors; he cites *Suetonius;* the Defendant cites *Suetonius;* the Plaintiff cites *Tacitus;* the Defendant cites *Tacitus*," and so on. But by referring to the common sources from which these things were cited, it was clear that the Defendant had reduced materially any legal consequences that could result from the circumstance of the books having similarity, for instance, similarity of plan, and similarity of dealing with particular portions of the subject.

There was, however, one point upon which the Defendant had not satisfied His Lordship. His Lordship was not satisfied, with reference to the quotations from *Retzius*, that the Defendant did not take one quotation from *Retzius* out of the Plaintiff's book. The Vice-Chancellor asked very justly: "If you did not get this passage from the Plaintiff's book, tell me where you got it." That was a very reasonable question to be asked of the author of a subsequent work which contained the same passage as a prior one.

The Defendant had satisfactorily explained all the passages contained in the common sources except that passage from *Retzius*, as to which His Lordship was of opinion that it was taken from the Plaintiff's book.

As to the passage in *Livy* relating to the *rutilatæ comæ*, it seemed that *Prichard* translated these words "red hair;" the Plaintiff in his book translated them "reddened hair," and so did the Defendant. It was of no use for the Plaintiff to use this argument in order to shew that the Defendant did not take this from *Prichard*, because there was good reason to think that he did go to *Prichard*. The Defendant appeared to be fairly acquainted with Latin, and might have translated the word "*rutilatæ*" "reddened," just as the Plaintiff had translated it "reddened." Besides that, he said that he had looked at the German translation from *Livy*, and found exactly the same translation of the word "*rutilatæ*" as the Plaintiff's, namely, "reddened," that is to say "red coloured," shewing, therefore, that from his own resources he might very well have been led to that, even if it was assumed that he was not well acquainted with Latin. In addition to that there was a French translation, which contained exactly the same expression.

His Lordship, therefore, came to the conclusion, from the use of those words, that there had not been a copying from the Plaintiff in that respect. The Plaintiff had not made out a slavish copying by the Defendant, who seemed merely to have been put on the scent of what authors to look to; and, looking into *Prichard*, he dealt with the quotations as he found them, adding something of his own upon the subject of red hair; and quoting, also, the passage from *Tertullian*. Therefore, so far, the Vice-Chancellor had laid a great deal too much stress upon these similarities, which were numerous, but which were well and properly accounted for, considering that there was a common subject propounded, a common mode of treating that subject which was open to both. With regard to all the various passages, with the exception of *Retzius*, the Defendant had been to the common source, had worked out of that common source, had laboured there, and had produced something of his own in addition.

There was then the case of the estimate as to the relative number of light-haired people and dark-haired people. The Plaintiff took his estimate of the population of *London* from the tables of 1841, which included *Surrey* and *Middlesex*. The Defendant professed to found his from the tables of 1861, but His Lordship was not satisfied that the Defendant did look to the tables of 1861.

Then as to the two passages of the Defendant's book which were the subject of the injunction. The first passage was with reference to *Gildas;* but His Lordship thought that the Defendant had been aware of the existence of such a work as *Gildas* before he saw the Plaintiff's book, for there was an absurd mistake in the statement of *Gildas* having copied *Bede*. Still it was clear that he added one passage about *Gildas* after he knew of the Plaintiff's book. There was now no dispute whatever about that, although there was a denial in the answer, and it must be taken that the passage about *Gildas* was written by the Defendant with the Plaintiff's book before him.

Then the question was, what use had he made of it? He did not say that he had made any use of the Plaintiff's book at all. The worst part of the Defendant's case was, that he did not make the frank admission—which he was bound to make—that he made use of the Plaintiff's book; but he said that he went to the common sources, such as the *Monumenta Historica*, and that was all that he did. No doubt he did go to the common source, but the Plaintiff said, "I do not doubt that you examined the *Monumenta Historica*, but you have made a great deal more use of my book than you ought to have made."

[His Lordship then gave his reasons for concluding that the Defendant took certain comments on *Gildas*, not from the Plaintiff's book, but from Sir *T. D. Hardy's* preface to *Monumenta Historica*.]

The result, therefore, of the whole case was this: The Defendant was led to look into the particular portions of *Prichard* by some of the quotations of the Plaintiff. Being directed to that part of *Prichard*, he did go to *Prichard's* book, for there is in his book a passage omitted by the Plaintiff. He was directed, by a passage in the Plaintiff's book which referred to *Gildas*, to inquire into *Gildas*, which possibly he never might have done if the Plaintiff had not led the way by pointing to that author and to the work of Sir *T. D. Hardy*. Upon perusing Sir *T. D. Hardy's* work, the Defendant found an account of *Gildas*, and a reference to *Nennius*, and certain remarks of *Gibbon;* and then he followed out those remarks by such remarks as he himself made upon the whole subject.

It seemed to His Lordship that the Vice-Chancellor had failed to do justice to the Defendant in this respect. He laid great weight on the common division of the subject, but that was not a matter fairly admitting of the weight which His Honour attached to it. He also laid great weight on the fact of the same authors being cited, and then wound up by asking the Defendant, "If you did not get them from the Plaintiff, where did you get them from?" The answer to that question was, if there be a common source, that he got them from that common source.

The Plaintiff had also made out a catalogue of authors consulted, but he could not be held to be exclusively entitled to that list.

Having come to the conclusion with regard to *Retzius,* that there was a taking from the Plaintiff's work of that particular quotation, and with regard to the population tables, that there was a suggestion made by the Plaintiff which the Defendant availed himself of in order to make his estimate larger than that of the Plaintiff, namely, half instead of one-third, the Court had to consider exactly how the case stood with reference to granting an injunction in such a state of things as that. No doubt the course adopted by the Defendant was open to a great deal of observation; but it had led the Vice-Chancellor to a conclusion more adverse to the Defendant than was altogether justified, though the Vice-Chancellor had great reason to entertain a very strong feeling of distrust of the Defendant's case. First, there was the answer, which undoubtedly stated the case in a manner which, if not intended to mislead, was calculated in the highest degree to do so. If the Defendant had simply said that he wrote the passage about *Gildas* after seeing the Plaintiff's book, he might have spared the Plaintiff the necessity of calling some of the witnesses and have saved a great deal of the cross-examination, and therefore a great deal of time to everybody concerned in the case, including himself. If the Defendant had been disposed to do what common fairness and justice required him to do, to say nothing of the oath which he took when he put in his answer, and had fairly said, "I acknowledge my obligations to this gentleman in putting me on a course of thorough critical investigation of *Gildas,* to begin with;

I beg to express my obligations to him in giving me the idea, through the medium of the tables to which I have had resort, of investigating the population of *London*, and the number of persons brought up from the country, and I beg also to express my obligations to him for pointing out that passage in *Retzius* which escaped my attention," nobody could have blamed him as being a pirate, or have said that what he had done amounted to piracy. That course, unfortunately, was not taken, and the Plaintiff's book had been unhandsomely dealt with by the Defendant, whilst there had not been that recognition of the Plaintiff's work which there ought to have been. Further than that, that passage in the answer did justify the Court in saying that the Defendant ought not to have any costs, because that passage had occasioned a great deal of the litigation, and if the whole matter had been stated in the answer in a straightforward manner, and clearly, and at once, as it had been subsequently stated, the Plaintiff might possibly have stopped the suit altogether, and certainly would not have incurred anything like the expense he had been put to in carrying it on. His Lordship was of opinion that the bill should have been dismissed, but, under the circumstances, without costs.

SIR G. M. GIFFARD, L.J., said that he had only a few observations to add to the judgment which the Lord Chancellor had delivered. First, with regard to the general nature of the two books. The Plaintiff undertook a more formidable task than was ever undertaken before in any copyright case; for there was the fact, that the two parties started with exactly the same theme to treat of. That was beyond all question. These books were written with reference to a prize that was proposed to be given by a society in *Wales*. They started with a desire to arrive at, as nearly as possible, the same conclusion, and with a desire, no doubt, to glorify the Ancient Britons as much as could well be done. Moreover, what may be termed the platform divisions, by means of which they worked out their books, were very nearly the same, and were for the most part taken from Dr. *Prichard's* book, and thus they were at once found starting entirely in the same groove. Besides, their books consisted mainly of results gathered from other authorities, and could not, in the true sense of the word, be treated as original, except to a very

L. C.
and L. J. G.
1869
Pike
v.
Nicholas.

slight extent. As to this, the Vice-Chancellor laid down most accurately in his judgment—"that there is no monopoly in the main theory of the Plaintiff, or in the theories and speculations by which he has supported it, nor even in the use of the published results of his own observations." It would, therefore, at once appear, that the task undertaken by the Plaintiff was an almost impossible one, unless he could shew that there were substantial passages either actually copied, or copied with mere colourable alteration. It would not do to shew merely one or two passages, but some material part of the book must be shewn to have been taken. Having looked through the books very carefully, His Lordship was of opinion that the only two points on which the Defendant had been completely touched were the points as to *Retzius* and the population returns. As to *Retzius*, it was his belief that the Defendant took that from the Plaintiff's book; but taking that one passage from the Plaintiff's book would be no ground for granting an injunction. As regards the population returns, His Lordship believed that the Defendant did not go to the 1861 tables; and also believed, that what he termed his observations were founded upon calculations from the Plaintiff's table; but that, again, would be no ground for granting an injunction. If, in point of fact, the Defendant had confessed that he had done that particular thing, the answer would have been at once, that was a use which he might make of the materials which were furnished to him by the Plaintiff in his book. The Plaintiff in respect of that was not entitled to an injunction, for it was neither copying, nor copying with a colourable alteration. Then, this further observation might be made, that upon referring to the MSS. it was beyond all question that great labour and a large amount of time must have been employed, even if the mere labour of writing those MSS. and nothing else was considered; but His Lordship was satisfied that the Defendant bestowed a great deal of labour and time on those MSS., and also, that there was, on his part, at all events, some research. His Lordship was also satisfied of this, which, in dealing with a question of copyright with reference to books such as these, was of great importance—that the book of the Defendant was his own composition, in this sense, that wherever he got the materials from they were worked up by him into his own language. No doubt that was what the Vice-Chancellor referred to when he said that the Defendant was very skilful in using materials which he had gathered from other sources, and had worked them up in his own shape and language. Between the style of the Plaintiff and the style of the Defendant there was a very material difference; the Defendant did not write at all in the Plaintiff's style, nor the Plaintiff in the Defendant's style. That brought His Lordship to the conclusion that there had been really no such use made by the Defendant of the Plaintiff's book as entitled the Plaintiff to an injunction, though the Defendant was much more indebted to the Plaintiff's book than he had at all admitted. His Lordship was satisfied that the suggestion to the Defendant with reference to *Gildas* was from the Plaintiff's book, and that he had also made use of other suggestions from the Plaintiff's book; but, still, that he had not made use of them in such a way as to entitle the Plaintiff to an injunction. His Lordship had not the least doubt that the Defendant examined for himself the prior authors to whom reference had been made, especially *Hardy's Monumenta Historica*, and *Prichard's Physical History of Mankind*, and probably he had some other resources. That being so, no injunction could be granted. The book was really the composition of the Defendant, and written in his own language. As to the costs, His Lordship was rejoiced to think that it was in the power of this Court to dismiss this bill, so that, at all events, the Defendant would get no costs of any kind, or in any shape. In the first place, the answer contained a passage which was not justified, which it was hardly too strong to say was wholly untrue. His Lordship thought further that the Defendant's evidence in the Court below was not ingenuous; and if the Vice-Chancellor granted an injunction against him, the Defendant had only himself to thank for it. His Lordship hoped and trusted that it would be a lesson to the Defendant; he would act far more wisely if he dealt in these matters fairly and openly, and if when he took the labour of another he acknowledged it. To some extent he had taken the labour of the Plaintiff in this case; and if he had freely, fairly, and openly acknowledged it, the Plaintiff would not, as His Lordship believed, have brought the suit into Court.

Solicitors: Messrs. *R. S. Taylor & Son;* Messrs. *Williams & James.*

L. C.
and L. J. G.
1870
Jan. 18.

In re HEYFORD IRONWORKS COMPANY.

FORBES AND JUDD'S CASE.

Company—Winding-up—Contributory—Subscriber to Memorandum—Paid-up Shares.

Port 351, 353-5,
[illegible]
[illegible]
14 Eq. 391-4,
8 Ch. 272
[illegible]
[illegible]

A person who subscribes the memorandum of association of a company for a certain number of shares is bound to take that number of shares from the company, and pay for them either in money or money's worth.

P. signed the memorandum of association of a company for 1350 shares, and *F.* and *J.* for 50 shares each. *P.* sold a business to the company, part of the price of which was to be paid by 1500 paid-up shares. By his direction 50 of these paid-up shares were allotted to *F.*, and 50 to *J.*:—

Held, that the obligation into which *F.* and *J.* had entered by subscribing the memorandum was not thus satisfied; and that each was a contributory in respect of 50 shares on which nothing had been paid.

Decision of the Master of the Rolls affirmed.

Drummond's Case (1) and *Pell's Case* (2) distinguished.

THIS was a motion by Messrs. *Forbes* and *Judd*, by way of appeal from a decision of the Master of the Rolls, refusing to remove their names from the list of contributories of the *Heyford Ironworks Company, Limited.*

The company was registered on the 26th of August, 1865.

By the memorandum of association it was stated that the capital of the company was £120,000 in 6000 shares of £20 each. *George Pell* signed the memorandum as a subscriber for 1350 shares. *Forbes* for 50, and *Judd* for 50.

In clause 86 of the articles of association a certain agreement was set forth, which was thereby ratified and declared to be binding on the company, by which *Pell* agreed to sell to the company the goodwill and stock-in-trade of a certain business carried on by him; and it was agreed that as part of the consideration to be paid to him the company were to issue to *Pell*, or his nominees, 1500 shares, which were to be treated as fully paid-up; and *Pell* was to accept them at their nominal value as part payment.

In pursuance of this arrangement 1350 fully paid-up shares were allotted to *Pell*, and by his direction 50 were allotted to *Forbes*, 50 to *Judd*, and 50 to another nominee, and were duly registered in their respective names.

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(1) Law Rep. 4 Ch. 772.

(2) Law Rep. 5 Ch. 11.

On the 21st of December, 1866, the company was ordered to be wound up. The Master of the Rolls decided that *Pell* must be placed on the list of contributories for the 1500 shares, and be allowed for the actual value of the business he had handed over to the company (1). On appeal the Lord Justice *Giffard* was of opinion that *Pell* was to be treated only as the holder of paid-up shares, and that his name must be removed from the list (2).

Forbes and *Judd* then took out a summons to have their names removed from the list. *Pell* deposed, that at the time of the formation of the company it was understood and arranged with the other subscribers of the memorandum of association that *Forbes* and *Judd* should each sign for 50 shares, part of the 1500 shares which were to be taken by him.

The Master of the Rolls dismissed the summons with costs, saying that he should follow *Migotti's Case* (3), and *Evans's Case* (4), with which *Drummond's Case* (5) and *Pell's Case* (2) appeared to His Lordship to be irreconcilable. His Lordship agreed with the observation in *Drummond's Case*, that a subscriber might pay for his shares either in money's worth or in money, but considered that the Act did not allow the obligation incurred by signing the memorandum to be satisfied by means of a debt existing at the time of signing it.

Mr. *Jackson*, for the Appellants:—

Evans's Case decides that signing the memorandum of association binds a man to take the number of shares for which he signs. The question is, whether that obligation has been discharged by the Appellants, and I submit that it has. *Migotti's Case* is different from the present, because there was no attempt to shew in that case that the taking the fully paid-up shares had any connection with the original bargain to take shares. They were two perfectly distinct transactions. In *Baron De Beville's Case* (6) it was admitted that if the shares were, for a valuable consideration, allotted as paid-up shares, there would be no liability under them. The present case is governed by *Drummond's*

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(1) Law Rep. 8 Eq. 222.
(2) Ibid. 5 Ch. 11.
(3) Ibid. 4 Eq. 238.
(4) Law Rep. 2 Ch. 427.
(5) Ibid. 4 Ch. 772.
(6) Ibid. 7 Eq. 11.

Case (1) and *Pell's Case* (2). No wrong would be done to any one by removing the names of the Appellants from the list, for any one who chose to look could have ascertained that they were holders of paid-up shares; whereas if they are left on the list, they will be saddled with a liability which they never undertook to bear, and, moreover, the company, after having received the consideration for these shares from *Pell,* will get it again from the Appellants.

Mr. *Roxburgh,* Q.C., for the official liquidator, was not called upon.

Lord Hatherley, L.C. :—

Migotti's Case (3) rests upon this simple principle, that when a person subscribes a memorandum of association for a particular number of shares, he thereby engages to take that number of shares, and to pay the company for them in one way or other. This payment the Appellants have not made. *Pell* having sold his business to the company, agreed to receive £30,000, part of his purchase-money, in 1500 fully paid-up shares. He was, however, content to be put down as holder only of 1350, and to let each of the Appellants be put down for 50; and it is contended that the Appellants have satisfied their obligations by being registered as holders of these shares, in respect of which they have not paid anything. But the engagement into which they entered was not to take shares from *Pell,* but to take shares from the company, for which they were to pay. *Drummond's Case* is quite distinct from this. *Drummond* had signed the memorandum, and so became bound to take and pay for shares. He took them, and tendered in payment something which the company was bound to buy at a price equal to the amount he was bound to pay. The company took the property tendered, and it was held that *Drummond* had discharged his obligation, it not being necessary that the money should be handed backwards and forwards. With all deference to the Master of the Rolls, I cannot see that it makes any difference at what time the debt of the company to the subscriber is contracted. The only question is, whether there is, at the time when the shares are to be paid for, a valid debt due from the company to the subscriber and immediately payable, so that the demands can be set off against each other. Thus in *Pell's Case* (1), assuming the contract for purchase from *Pell* to be valid, when he came to ask for his shares, he had a right to say: "You have got the price in the shape of the property which I have handed over to you." As to hardship to the creditors of the company, there is none, for they get the property instead of the money. The only difference between the Lord Justice *Giffard* and the Master of the Rolls in that case was this: The Master of the Rolls thought that *Pell*, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy *Pell's* business, and the Lord Justice *Giffard* thought that the contract not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over. Here the Appellants, to whom the company owes nothing, between whom and the company there is no contract, except a contract by the Appellants to take and pay for shares, seek to come in for part of the benefit of *Pell's* contract. Such a contention is entirely opposed to the *ratio decidendi* in *Migotti's Case* (2); and if it were allowed we must hold that *Pell* might have divided his shares into a hundred lots, and formed the company into a numerous body of shareholders, none of whom, except himself, had contributed anything. The obligation of the Appellants was to take shares issued to them by the company, not shares made over to them by *Pell.*

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(1) Law Rep. 4 Ch. 772.
(2) Law Rep. 5 Ch. 11.
(3) Law. Rep. 4 Eq. 238.

Sir G. M. Giffard, L.J.:—

This case is plain and simple, and is a mere repetition of *Migotti's Case*, which proceeds on the ground that if a man signs the memorandum of association he is bound to take shares from the company, and does not satisfy that obligation by taking them from some one else. It was said in the Court below that *Drummond's Case* (3) and *Pell's Case* are not reconcilable with *Evans's Case* (4), but this is not

(1) Law Rep. 5 Ch. 11.
(2) Ibid. 4 Eq. 238.
(3) Law Rep. 4 Ch. 772.
(4) Ibid. 2 Ch. 427.

L. C. and L. J. G.
1870
Forbes and Judd's Case.

so. *Drummond's Case* (1) arose under an agreement for amalgamation, under which shareholders in each company were to take shares in the new company in lieu of their shares in the old. *Drummond*, who engaged to take shares in the new company, and pay for them, fulfilled his obligation by taking them and giving up his old shares. There was a direct dealing between *Drummond* and the new company, and the new company received a benefit from him, which satisfied his obligation to them. So in *Pell's Case* (2), there was a direct agreement between *Pell* and the company, by which his agreement to take and pay for shares was satisfied, the company receiving property from him instead of money. The Appellants here have given nothing to the company, and so have not fulfilled their obligation. The case ought never to have been brought from the Chief Clerk to the Master of the Rolls, nor from the Master of the Rolls to us.

Solicitors: Messrs. *Elmslie, Forsyth, & Sedgwick*; Messrs. *Denton & Hall.*

L. C. and L. J. G.
1869
Nov. 16; Dec. 6.

PICARD *v.* HINE.

Practice—Next Friend on Appeal—Debt of Married Woman—Creditor on Separate Estate.

A married woman is not entitled to present a Petition of Appeal without a next friend, although another person joins in the Petition, and the suit relates to her separate estate.

Where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt.

Decree of *Stuart*, V.C., varied.

10 Eq 89
17 Eq 343
3 Ch D 596
6 Ch D 742
3 CPD 198
11 Ch D 869
14 Ch D 858
843–4
17 Ch D 155–8
8 QBD 178

THE bill in this case was originally filed against *Sophia Hine*, as a widow, for the specific performance of a contract by her to buy the lease of a watchmaker's shop for £225. The bill was afterwards amended, and a statement was introduced, and was admitted by the Defendants as true, that *Sophia Hine* was a married woman living separate from her husband, and possessed of a considerable amount of property settled to her separate use, of which *F. Fish* was trustee; and *Fish* and the husband were made Defendants.

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(1) Law Rep. 4 Ch. 772.

(2) Law Rep. 5 Ch. 11.

Followed Lancashire & Yorkshire Bank v Teer [illegible]
[illegible] Ch. ~~Davies v Jenkins~~ 6 Ch D [illegible]

The Defendants alleged that there had been misrepresentation by the Plaintiff, and disputed the rights of the Plaintiff as against the separate estate.

The Vice-Chancellor *Stuart* decreed specific performance, and ordered *Fish*, the trustee, out of the separate estate of *Sophia Hine* in his hands, to pay to the Plaintiff £225 and interest, and the costs of the suit.

Against this decree the Defendants *Sophia Hine* and *F. Fish* presented a Petition of Appeal.

When the appeal was called on, Mr. *Dickinson*, Q.C., and Mr. *Willis*, for the Respondent, objected that *Sophia Hine* was a married woman, and ought to have petitioned by her next friend: *Elliot* v. *Ince* (1); since the decree had been made *Frederick Fish*, the other Appellant, had become bankrupt, so that there was no one responsible for the costs of the appeal.

Mr. *Schomberg*, Q.C., and Mr. *Bush*, for the Appellants, contended that in this case it was not necessary that the married woman should petition by a next friend, as she had separate estate, and as there was another Petitioner who would be liable for the costs, which prevented the rule from applying. The other Petitioner was a trustee only, and was not prevented from suing by his bankruptcy.

LORD HATHERLEY, L.C., said that there was nothing to take this case out of the usual rule. In *Elliot* v. *Ince* the solicitor for the Appellant had undertaken to pay the costs of the day, and thereupon the appeal was ordered to stand over. If the solicitor in this case would undertake to pay the costs of the day, and would before that day week either amend the Petition of Appeal or undertake to pay the costs, then the Petition should stand over for a week, otherwise the Petition would stand dismissed.

The solicitors for the Appellants undertook personally to pay

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(1) 7 D. M. & G. 475. 3 Jur N S 597.

L. C. and L. J. G.
1869
PICARD v. HINE.

such costs as the Court should award in respect of the Petition of Appeal, and the appeal came on again.

Mr. *Schomberg*, Q.C., and Mr. *Bush*, for the Appellant, as to the right to specific performance against the estate of a married woman, cited *Francis* v. *Wigzell* (1), *Johnson* v. *Gallagher* (2).

Mr. *Dickinson*, Q.C., and Mr. *Willis*, for the Plaintiff, referred to *Murray* v. *Barlee* (3).

Their Lordships expressed their opinion that *Fish* was merely brought there as a trustee, and ought not to be directed to pay costs, and then proceeded to deliver their judgment on the case.

LORD HATHERLEY, L.C. :—

We both think it very desirable that the position of a married woman who contracts as if she were a *feme sole* should be placed upon a well understood basis; and we think that that has been done by Lord Justice *Turner* in his judgment in *Johnson* v. *Gallagher*.

There has been much discussion as to the precise mode in which a married woman's estate could be affected by anything except actual disposition. It was strongly felt by the Court that there was great injustice in protecting a married woman and allowing her to deprive others of their property by entering into engagements which she must have known herself unable to fulfil in any other way than out of her separate estate, though the Court seems to have felt some difficulties as to the manner in which the separate estate could be reached.

At one time it was held that an appointment would be inferred, but Lord *Cottenham*, in *Owens* v. *Dickenson* (4), disposed of that by saying, that if so the creditors must take in the order of the appointments. All these theories have been given up, and the doctrine has been placed upon a sound foundation by the decision in *Johnson* v. *Gallagher*. Following that doctrine, the married woman in this case must be taken in making this contract to have

(1) 1 Madd. 258.

(2) 3 D. F. & J. 494; 7 Jur. (N. S.) 273.

(3) 3 My. & K. 209.

(4) Cr. & Ph. 48.

dealt with respect to this property, and in such a case the Court will compel her to fulfil her obligations.

As Lord Justice *Turner* observed in *Johnson* v. *Gallagher* (1), it might be different where a married woman was living with her husband, but where, as in this case, she was living separate from her husband, that is at once a strong reason for saying that she intended to bind that property out of which alone she could pay that which she contracted to pay. When she by entering into an agreement allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered, not by reaching her, but by reaching her property. Therefore the property which she had at the time of the decree may be applied towards satisfaction of the debt which it is necessary to satisfy. There is nothing in this particular case to shew that she did not intend to perform this obligation out of her separate property; but being simply a debt up to the time of the actual judgment, it is only that property which she then had which can be charged, as to which there must be an inquiry; and it is necessary that there should be a charge which will include principal, interest, and costs of suit.

Having satisfied ourselves that there was here a contract, the only question is whether it ought to be enforced, as to which we feel very little hesitation. Misrepresentation has been alleged, but none proved, and credit must be given to the Plaintiff's version of the case. The decree will be for specific performance, but must be varied accordingly.

SIR G. M. GIFFARD, L.J.:—

As to the law of this case it is unnecessary to say anything, because in the judgment of the Lord Justice *Turner*, in *Johnson* v. *Gallagher*, everything relating to the subject is clearly laid down, and it amounts in substance to this: that a creditor having a claim against a married woman can come here and assert and enforce an equity as against her separate estate. This bill was originally framed against the Defendant as if she was a widow, but as amended, it contains a distinct averment that she was a married woman and had separate estate, and is filed against her and against the trustee

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(1) 3 D. F. & J. 494; 7 Jur. (N. S.) 273.

L. C.
and L. J. G.
1869
PICARD
v.
HINE.

of the separate estate; there is, therefore, no difficulty in the frame of the pleadings. The defence on the ground of misrepresentation has failed, and there only remains the question of how the decree is to be framed. If the question had been brought to the attention of the Vice-Chancellor no doubt the decree would have been in the proper form, and would have directed an inquiry, and have provided for the costs of the trustee.

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6 Ch.D. 730

MINUTES.—Vary decree. Declare separate property of *Sophia Hine*, vested at this present date in her or in any other person in trust for her, chargeable with the payment of the £225 and interest, and charge the same accordingly. Take account of what is due to the Plaintiff. Inquire of what the separate property consists at the present time and in whom it is vested. Inquire as to rates and taxes on house, and let *Fish* be at liberty to retain his costs out of the separate property in his hands. Reserve further consideration. Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Evans & Laing*.
Solicitors for the Defendants: Messrs. *Keene & Marsland*.

MORRIS *v.* WRIGHT.

L. J. G.
1870
Jan. 14.

18 § 457

Copyright in Directory—Use of Slips in compiling New Directory, where justifiable—Interlocutory Injunction.

Although the compiler of a new directory is not justified in using slips cut from one previously published, for the purpose of deriving information from them for his own work, yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained.

The Plaintiff, who was the publisher of a trades directory, filed a bill against the Defendant, who was preparing for publication a new directory, charging him with using slips cut from the Plaintiff's work in obtaining materials for the new directory, and with copying from such slips. The Plaintiff having moved for an interlocutory injunction, the Defendant filed an affidavit, in which he admitted that at first he had used slips from the Plaintiff's work in obtaining materials for his own; but having discovered that it was illegal to do so, he had discontinued the practice; and he denied having copied any of such slips. In the absence of satisfactory evidence of the actual contents of the new directory, which was not yet published, the Court refused the injunction.

Decision of *James*, V.C., affirmed.

Kelly v. *Morris* (1) and *Morris* v. *Ashbee* (2) explained.

THIS was an appeal from an order made by Vice-Chancellor *James*, dissolving an injunction previously granted to restrain the publication and sale of a work in course of preparation by the Defendants, entitled "*The Handbook, or Manufacturers' and Exporters' Directory of Great Britain.*"

The Plaintiff, *J. S. C. Morris*, was the proprietor of a publication called "*The Business Directory of London.*" The Defendants, *G. T. Wright*, *F. W. Sternberg*, and *J. R. Conway*, had been formerly employed by the Plaintiff as canvassers on his behalf at *Manchester* for a local directory until the spring of 1868, when they left his employment, and, together with a person named *Franklin*, who had also been in the Plaintiff's employment, commenced the preparation of a new mercantile directory bearing the name of "*The Handbook, or Manufacturers' and Exporters' Directory of Great Britain.*"

The Plaintiff, in his bill, charged the Defendants with making use of his directory in preparing their new work, which was in the press, but not yet published, and prayed for an injunction to restrain the Defendants from selling or publishing their work, and from any copying or piracy from the *Business Directory of London.*

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(1) Law Rep. 1 Eq. 697.

(2) Law Rep. 7 Eq. 34.

The Plaintiff having moved for an injunction in terms of the prayer, the Vice-Chancellor granted an injunction, with liberty to the Defendants to move to dissolve it, and subsequently made an order dissolving it, from which the Plaintiff now appealed.

The Plaintiff's case was supported by the affidavit of *Franklin,* who was no longer in partnership with the Defendants. He stated that he had canvassed on behalf of the Defendants for the projected work, and was furnished with slips cut from the Plaintiff's directory, which he used to assist him in going round to merchants and others, and obtaining particulars of their residence and business, and also in soliciting advertisements, for which money was in several instances paid. He also stated, that in accordance with the contract between himself and the Defendants, these slips were sent to the Defendants and copied for the press to be printed in their directory.

The Defendants, on the other hand, filed affidavits, in which they admitted having at first provided their canvassers with cuttings from the Plaintiff's directory, but had discontinued their use after the decision of the present Lord Chancellor in *Morris* v. *Ashbee* (1), and they denied that they had copied or intended to copy any part of the Plaintiff's directory.

The statement made by the Defendant *Wright,* in his affidavit, was as follows:—

Par. 13. "Before the decision of this Honourable Court in the case of *Morris* v. *Ashbee,* and knowing the usual practice of the Plaintiff, and the instructions which were uniformly given to his canvassers by him, we had no doubt but that we had a right to use cuttings from any copyright directory or other book for the mere purpose of guiding ourselves or our canvassers to the houses of the different manufacturers and traders, so long as we made no other use of such cuttings, and obtained from such persons themselves their names and addresses and any additional entries or other matters which they might wish to have published in our projected work; that is to say, so long as we abstained from copying any part whatever of such other works into our own work, and inserted into our own work nothing but matter obtained originally from our subscribers and patrons."

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(1) Law Rep. 7 Eq. 34.

Par. 16. "The course of business of myself, my partners, and our canvassers respectively, was, upon calling on the different persons canvassed, to shew them a form printed on the back of a specimen of our intended work, to canvass them for an order to insert their names, business descriptions, or other matters proposed to be printed in our work, and, if successful in getting an order, to get the person or persons giving the same to fill up the form presented to him or them, or to furnish a billhead, circular, or card of his or their own firm, from which such names and extra matter were to be taken. If such persons declined to pay anything, they were requested to give authority to insert their names only in our work, for which we required no payment, and were asked to give a card as evidence of such authority having been given. The bundles of papers produced are the forms used as aforesaid, and filled up by the persons canvassed, or filled up by the canvassers respectively from information directly given by the persons canvassed. The cards produced are cards received from the canvassers. I superintended the compilation of our intended work, and, to the best of my knowledge, information, and belief, not a single name, or any additional matter of any kind, has been copied for the manuscript of our work from the said work of the Plaintiff, or from the said work of Messrs. *Ashbee & Co.* Where in the manuscript of our said work the names only of persons appear, such names have been copied from the cards received as aforesaid; and where the names appear with additional matter, such names and additional matter have been copied from entries made in our own forms, or on cards or other documents supplied and obtained in manner aforesaid."

They also put in a letter of the Defendant *Wright* to *Franklin*, dated the 13th of November, 1868, two days after the decision of the case of *Morris* v. *Ashbee* (1), in which this passage occurred:—"You have the *Sheffield* papers, look over them and see if any of them are from his cuttings, if they are, mark them, and I must write to the parties and get them to fill up a fresh form."

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(1) Law Rep. 7 Eq. 34.

Mr. *Morgan*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff:—

The cases of *Kelly* v. *Morris* (1), and *Morris* v. *Ashbee* (2), are conclusive authorities that a compiler of a new work has no right to make use of an existing work for the purpose of saving himself trouble, even though he does not absolutely copy from it. He must obtain his information independently, and may only use the existing work for the purpose of verifying the correctness of the information he has obtained. Here the Defendants have sent round canvassers with slips from the Plaintiff's book, with the names and addresses of merchants and others, to save themselves the trouble of getting their information from the parties themselves; and they have, moreover, taken from the Plaintiff's book cuttings which contained advertisements, and by means of them obtained advertisements for their own work. We also charge them with copying the cuttings for insertion into their directory; and although they deny this in their affidavit, it is borne out by their books, and is consistent with the contract between *Franklin* and the Defendants. *Scott* v. *Stanford* (3) is also an authority in our favour.

Mr. *Kay*, Q.C., and Mr. *Hunter*, for the Defendants, were not called on.

SIR G. M. GIFFARD, L.J.:—

It is to be regretted that the Plaintiff should have brought the case here at the present time, because I have no doubt that at the hearing full justice will be done, and I desire to do nothing which can prejudice the decision that may be come to at the hearing when all the facts of the case are before the Court. All I have to consider is, whether at this moment an injunction ought to be granted, or, in other words, whether the Vice-Chancellor ought to have dissolved the injunction which he had previously granted. In the present state of the evidence I have no hesitation in saying that the Vice-Chancellor was quite right in dissolving that injunction. At present the matter stands thus:—In the first place, there has been no publication; secondly, no book has yet been printed;

(1) Law Rep. 1 Eq. 697.

(2) Law Rep. 7 Eq. 34.

(3) Law Rep. 3 Eq. 718.

L. J.G.
1870
Morris
v.
Wright.

and, thirdly, if this book was published to-morrow, and put in a shop window, and was found to contain that which the Plaintiff says it does contain, beyond all question the Plaintiff would get an injunction. The evidence relied upon by the Plaintiff is that of Mr. *Franklin*, and on the other side great stress has been laid upon Mr. *Wright's* letter to Mr. *Franklin* of the 13th of November, 1868. It is to be observed that *Morris* v. *Ashbee* (1) had been decided on the 10th of November, and that up to that time the parties took a different view of the law from that which was laid down in that case. What Mr. *Wright* writes in that letter is this:—[His Lordship read the letter.] That letter is unquestionably the letter of a person who knew the position in which he stood with reference to those cuttings, and who at the time was desirous, if any of these *Sheffield* cuttings had been used bodily, as they had been used in *Morris* v. *Ashbee*, that the cuttings should be put aside, that distinct questions should be put to the parties, and that the parties should give their own special instructions about the entries. Am I then to infer at this stage of the cause, there being a direct conflict of evidence between Mr. *Franklin* and Mr. *Wright*, that it is Mr. *Wright's* intention to do the very thing which, by the letter of the 13th of November, 1868, he expressed his intention not to do, or, in other words, to do an illegal act, which, if found out, would make him undoubtedly liable? Whether he has or has not done so is a question to be tried at the hearing. I have no doubt whatever that in November, 1868, it was his intention, at all events, to act strictly in accordance with the 13th and 16th paragraphs of his affidavit, and I do not think it will be very easy to arrive at any conclusion on the question, whether he has done so or not, until the materials which were prepared for the printers are produced, which at present are not produced, and as to the contents of which I cannot even speculate at this stage of the cause. That being so, let us see what the contents of the 13th and 16th paragraphs of his affidavit are, and whether there is anything in *Kelly* v. *Morris* (2), and in *Morris* v. *Ashbee*, which would render that which Mr. *Wright* admits that he has done, illegal. [His Lordship then read the 13th and 16th paragraphs of the Defendant *Wright's* affidavit, which are given above, and continued:—]

(1) Law Rep. 7 Eq. 34.

(2) Law Rep. 1 Eq. 697.

L. J. G.
1870
MORRIS
v.
WRIGHT.

Those two paragraphs are perfectly specific. No doubt he admits that the slips were cut from the Plaintiff's book for the purpose of guiding him to the residences of the persons who were canvassed. But he admits nothing more: and he denies copying of any kind or description.

Let us then look at the definition of copyright as it is found in one or two decided cases. Lord *Cranworth*, in *Jefferys* v. *Boosey* (1), said that the true definition of "copyright" is the sole right of multiplying copies. That, of course, means that you must not copy with or without colourable alterations. That is a general definition of copyright.

Then with respect to the latter cases, I may observe that in *Kelly* v. *Morris* (2), as well as in *Morris* v. *Ashbee* (3), there was direct copying. Not only were the slips used for the purpose of canvassing, but the course pursued was this: when a slip was presented to the person who was canvassed, he was asked whether he authorized that particular entry; they proceeded to get his authority for its insertion, and the entry was copied in the book. In *Kelly* v. *Morris* (4) the present Lord Chancellor says: "I think there must be an injunction in the same terms as that which was granted in *Lewis* v. *Fullarton* (5), viz., to restrain the publication of the parts which are pirated without waiting till all the parts which have been pirated can be distinctly specified. The Defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done; in case of a road book, he must count the milestones for himself; in the case of the map of a newly-discovered island (the illustration put by Mr. *Daniel*), he must go through the whole process of triangulation just as if he had never seen any former map; and generally, he is not entitled to take one word of the information previously published without independently working

(1) 4 H. L. C. 815. 1 Jur N S 643.
(2) Law Rep. 1 Eq. 697.
(3) Law Rep. 7 Eq. 34.
(4) Ibid. 1 Eq. 697, 701.
(5) 2 Beav. 6, 14.

out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So in the present case the Defendant could not take a single line of the Plaintiff's directory for the purpose of saving himself labour and trouble in getting his information." If this passage goes further than what I take it to mean, I cannot doubt that it goes beyond what the law authorizes, and beyond the decision of the Lord Chancellor and myself in the late case of *Pike* v. *Nicholas* (1). It does not mean that he may not look into the book for the purpose of ascertaining where a particular person lived, and for the purpose of ascertaining whether it was worth his while to call upon that person or not; but it means that he may not take that particular slip and shew that to the person and get his authority as to putting that particular slip in. Then the Lord Chancellor goes on—it does not rest there (2): " The Defendant, from his description of the way in which he had, in the first instance, compiled his *Business Directory*, seems to have known exactly what he might do. No doubt the expense of procuring information in a legitimate way is very great. The Defendant himself has told us so, and also that it was not for some years that he was able to make it pay; but the Defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of publicity in the names of private residents who had, as he expressed it, 'given their names for public use.' What he has done has been to copy the Plaintiff's book, and then to send out canvassers to see if the information so copied was correct. If the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied from the Plaintiff's book was reprinted bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this, the Defendant tells us that he had a number of new agents, and that one of them had performed his part of the work carelessly, thus at once shewing how easy it would be, on the system adopted by the Defendant, for any negligent agent to send back his list all ticked as if correct without having taken the trouble to make a single inquiry."

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(1) *Ante*, p. 251.

(2) Law Rep. 1 Eq. 702.

L. J. G.
1870
MORRIS
v.
WRIGHT.

I understand that judgment to rest entirely upon the facts, and I am quite satisfied, from what the Lord Chancellor said in *Pike* v. *Nicholas* (1), that it was never his intention to say a person may not look at the directory for the purpose of directing him where to call; but what he meant was, that he must not take the passage of the directory, and go and see whether it happens to be accurate, and, if it is accurate, bodily copy the passage into his directory.

With respect to my own judgment in *Morris* v. *Ashbee* (2), what I said was this: "The Plaintiff incurred the labour and expense, first, of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement; and though each individual who paid might, no doubt, have his own name printed in capital letters, or with the same superadded lines, whereever he chose, neither one nor all of them could authorize the cutting of a series of slips, or the taking of the names as arranged from the Plaintiff's directory, and the use of them in the printing of a rival work. This brings me to *Kelly* v. *Morris* (3). In that case no doubt *Morris's* canvassers did more than anything that has been proved to have been done by or on the part of the Defendants; for in *Kelly* v. *Morris*, if the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied was reprinted bodily. Neither the decree, however, nor the judgment is based solely on or confined to this. The decree is general in its terms, following *Lewis* v. *Fullarton* (4), and the substance of the judgment is, that in a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at those results by some independent road. If this was not so, there would be practically no copyright in such a work as a directory. Moreover, it is not necessary for me to define the extent to which the Defendants might have gone, or may go, in using the Plaintiff's directory. What I have to determine is, whether they could lawfully do what they actually did. Now it is plain that it could not be lawful for the Defendants simply to cut the slips

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(1) *Ante*, p. 251.

(2) Law Rep. 7 Eq. 34, 40.

(3) Law Rep. 1 Eq. 697.

(4) 2 Beav. 6.

L. J. G.
1870
MORRIS
v.
WRIGHT.

which they have cut from the Plaintiff's directory and insert them in theirs. Can it, then, be lawful to do so because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say clearly not."

Therefore it is quite clear in both those cases the parties had gone very far beyond anything stated in the 13th and 16th paragraphs of Mr. *Wright's* affidavit. They had virtually and bodily copied from the book—they had copied from the very slip—and all they had done was to take the slip and verify it, and nothing else. In the late case of *Pike* v. *Nicholas* (1) we had this: two rival works were published with reference to the same subject-matter, and we thought certainly that the Defendant had been guided by the Plaintiff's book more or less to the authorities which the Plaintiff had cited; but it was a perfectly legitimate course for the Defendant to refer to the Plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the Plaintiff's book; and so here, if the fact be that Mr. *Wright* used the Plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the Plaintiff's book. I do not wish to say anything whatever to prejudice the ultimate decision of this case, supposing the Plaintiff makes out such a case as he alleges by his bill; but I think that in the present state of circumstances the Vice-Chancellor did that which was right between the parties; and therefore, although I regret it, I must dismiss the application with costs.

Solicitors for the Plaintiff: Messrs. *Williams & James.*
Solicitor for the Defendants: Mr. *J. Perry.*

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(1) *Ante*, p. 251.

L. J. G.
1870
Jan. 26, 28.

12 Eq. [illegible]
3 Ch D. 92

In re COUNTY LIFE ASSURANCE COMPANY.

Policy of Assurance—De facto Directors—Persons falsely assuming to carry on Company—Notice.

A person who effects a policy with a life assurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the Acts of Parliament under which it is incorporated.

A life assurance company was registered in 1863. By the articles of association *P.* was appointed managing director. The directors who were named in the articles, and signed the memorandum of association, refused to act, and passed a resolution that the company should not carry on business or allot shares. Notwithstanding this resolution, *P.* and one of the shareholders persisted in carrying on the business at the registered office of the company, and allotted shares and appointed directors. A stranger effected a policy at the company's office, which was signed by three of the *de facto* directors, and sealed with what purported to be the company's seal:—

Held (affirming the decision of the Master of the Rolls), that the policy was binding on the company.

THIS was an appeal from a decision of the Master of the Rolls made in the winding up of the *County Life Assurance Company, Limited.*

This company was formed in January, 1863, and was registered under the *Companies Act,* 1862. The promoter of the company was Mr. *W. H. Preston,* and in the articles of association it was recited that the said *W. H. Preston* had taken considerable trouble and incurred considerable expense about the establishment and formation of the company, in the expectation that he should be manager and actuary, or managing director, to the said company, and have the salary and emoluments and other benefits therein specified secured to him.

It was provided by the articles, among other things, that the directors thereby appointed should hold office till the first ordinary meeting of the company, and in the meantime should have power to appoint other qualified persons as directors in addition to, or in substitution for, any of their number.

L. J. G.
1870
In re
COUNTY LIFE ASSURANCE COMPANY.

That the following should be the first directors:—*B. Ambler, T. J. Bolton, E. B. Keeling, L. Munro,* and *C. G. Prowett.*

That *W. H. Preston* should be the first manager, or managing director and actuary, of the company; that he should have a sum of £5000 as promotion money, and £10 per cent. on the gross income of the company, and the sum of £3500 in case of the company amalgamating with any other company.

That every policy, deed, or instrument required to be executed on behalf of the company should be signed by three, at least, of the directors, and countersigned by the managing director, secretary, or manager, and unless, from the nature of the instrument, the same should be inexpedient or unfit, should be sealed with the seal of the company.

The memorandum and articles of association were subscribed by the following persons:—*B. Ambler, T. J. Bolton, E. B. Keeling,* and *L. Munro,* who had been nominated directors, and five other gentlemen, including Mr. *E. H. Smith,* who were not named as directors. The total number of shares subscribed for was 825. Mr. *Preston* was not a subscriber. The company was registered on the 9th of January, 1863. In the month of June, 1863, the directors who had subscribed the memorandum held a meeting, at which they passed a resolution that the objects of the company could not be successfully carried out, and that no shares should be allotted, and no further steps taken towards the formation of the company. They gave notice of this resolution to the other subscribers, and also to Mr. *Preston.* Mr. *Preston,* however, took no notice of this resolution, and, being joined by Mr. *E. H. Smith,* proceeded to choose fresh directors in the place of those who declined to act, and to appoint a secretary, and to allot shares.

On the 11th of December, 1863, Mr. *Preston* wrote to Mr. *Ambler* as follows:—

"Dear Sir,—I am now making the necessary arrangements for the *County Assurance Company's* commencement of business, and as you have not joined the board of the *Life Association of England,* but still remain a shareholder of the company to the extent of 100 shares, with the present payment of £100, it has occurred to me to ask you, as you have apparently derived no advantage from retiring, whether you would not, in your own interest, wish to form a mem-

L. J. G.
1870
In re
COUNTY LIFE
ASSURANCE
COMPANY.

ber of the board. If so, I shall be glad to see you here between 12 and 2.

"Yours very truly,
"*W. H. Preston.*"

A similar letter was written to Mr. *Bolton.*

On the 7th of March, 1864, Mr. *Bradock*, the secretary, sent a circular to the subscribers of the memorandum in the following terms:—

"I have the pleasure to inform you that the company commenced operations at the temporary offices, as above, in the early part of January last; I have, therefore, to request that you will be so good as to pay to the *London, Hamburgh, and Continental Exchange Bank*, 79, *Lombard Street*, the sum of £ , being £1 per share upon the shares for which you have signed the articles of association. The bankers' receipt will be exchanged in due course for scrip certificates. I am happy to state that the prospects of the company are of a most encouraging nature.

"Yours truly,
"*William F. Bradock*, Secretary."

In reply to this circular the solicitors acting for Mr. *Ambler* and Mr. *Bolton* wrote to Mr. *Bradock* repudiating, on their behalf, all connection with the company, and stating that they considered it a failure and at an end.

Business was, however, carried on by *Preston* and those acting with him, and about 350 policies were effected. The offices of the company originally registered were at 40, *Gracechurch Street*, but they were afterwards removed to 36, *Moorgate Street*, then to 36, *Cannon Street*, and finally to 22, *Moorgate Street*, each change being duly entered on the register. The name of the company was painted up over the office.

Among the policies granted by the company was one for £250 on the life of Sir *A. Tichborne*, effected by the *Briton Medical and General Life Association*. The policy was signed by *W. Morphew*, *E. H. Smith*, and *W. H. Preston*, as directors, and *C. Rutherford*, as secretary, and sealed with the seal of the company.

The company carried on business till the month of January, 1866, when a meeting of the shareholders was called, and it was resolved that it should be dissolved, and the business transferred to the *National Standard Life Assurance Company.* The latter company took all the policies granted by the *County Life Assurance Company* except that on the life of Sir *A. Tichborne,* and one other for a small amount, those lives having dropped before the amalgamation.

In July, 1867, an order was made to wind up the *County Life Assurance Company* on the petition of *Ambler, Munro,* and *Keeling,* and on the 10th of December, 1869, the Master of the Rolls made an order admitting the claim of the *Briton Medical and General Life Association* for £250 in respect of the above-mentioned policy.

The official liquidator appealed from this decision.

Sir *Roundell Palmer,* Q.C., Mr. *Jessel,* Q.C., and Mr. *Ince,* for the Appellant:—

The policy in question was not granted by the company, but by persons assuming to be the company, but in no way authorized to act for it. None of the persons signing the policy and purporting to be directors had been properly elected directors; they had been simply nominated by *Preston.* Nor had *Preston,* or those acting with him, any authority to make or use a seal for the company. As the original directors would not act, and no new directors had been elected at any general meeting, no one had any right to carry on the business of the company, and the act of setting the seal to the policy was, in fact, forgery. We do not contend that the company was at end until it was wound up under the order of the Court; but *Preston* and those acting with him were not the company, but a partnership acting on their own account, and they may be liable on the policy which they have signed. It is said that the original directors acquiesced in the proceedings of *Preston;* but they did not do so, for they protested against those proceedings. It was not necessary to do more. If a merchant's clerk takes an office and writes up his master's name, he does not thereby make his master liable, nor throw the *onus* on him of filing a bill for an injunction.

Mr. *Southgate,* Q.C., Mr. *Eddis,* Q.C., and Mr. *F. Webb,* for the *Briton Medical and General Life Association:—*

We have nothing to do with the charges against *Preston* and

L. J. G.
1870
In re
COUNTY LIFE ASSURANCE COMPANY.

those who acted with him. We are *bonâ fide* holders of a policy which we effected at the registered office of the company, and through a person who was named in the memorandum of association as the managing director. At that time the company had been registered three years, and had carried on business two years. How should we know that the persons signing the policy as directors had not been legally appointed, or that the seal had been engraved without authority? So far as appeared on the public register, everything was correct. If the original directors wished to stop the company, they might have called a general meeting and dissolved it, or have obtained an injunction against *Preston* from using the name of the company. As they did not do so they must be taken to have acquiesced. In the case put by the other side of a merchant's clerk using his master's name, if the master had originally given him any sanction to carry on the business, it would then be incumbent on the master to take some public proceeding to stop him. *Preston* was duly appointed managing director of this company, and no legal step had been taken to revoke his authority: *Royal British Bank* v. *Turquand* (1); *Agar* v. *Athenæum Life Assurance Society* (2); *Prince of Wales Assurance Company* v. *Harding* (3); *In re Athenæum Life Assurance Society* (4).

Mr. *Ince*, in reply, referred to *Howbeach Coal Company* v. *Teague* (5).

SIR G. M. GIFFARD, L.J.:—

It certainly is marvellous that a company such as this should have been able to carry on business to the extent of having 350 policies and upwards effected with it. However, the evidence on both sides seems to admit that that is the fact, and what I really have to decide is, whether or not a person who holds one of those policies has a right to prove against this company; the company, and no one else, being on this occasion the Appellants.

As far as the facts go, they lie in a very small compass:—[His

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(1) 6 E. & B. 327. 2 Jur N.S. 663
(2) 3 C. B. (N. S.) 725, 4 Jur N.S. 211
(3) E. B. & E. 183.
(4) 4 K. & J. 549. 2 Jur N.S. 1146
(5) 29 L. J. (Ex.) 137. 5 H&N 151. 6 Jur NS 275.

L. J. G.
1870
In re
County Life
Assurance
Company.

Lordship then shortly referred to the facts as stated above, and continued:—] That is the internal history of the company; and before I go further, I may say that the directors of this company, at any moment they chose, might have got an injunction—at any moment they chose they might have put an end to this company. They did not choose to do so, and it is not too much to assume against them that they knew that the company had a place of business, and that Mr. *Preston* intended to commence and did commence operations.

In that state of things the Respondents who make this claim effected a policy duly and properly in the usual course of business. They knew nothing about the internal arrangements of the company; they were not aware that anything irregular had taken place; they were not aware that the directors had refused to act, or of any one of those circumstances which are detailed in this evidence. If we look at the policy, the policy, on the face of it, is effected in accordance with the articles. No one looking at the articles, and reading the policy, could know, or suspect, or believe otherwise than that the policy was as duly effected as any policy you might have from the *Equitable*, or any of the other large companies in *London*. I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the General Act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with.

The company is bound by what takes place in the usual course of business with a third party where that third party deals *bonâ fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*. In this case the ordinary correspondence takes place, then the applicant goes to the office and gets from the office a document which appears, on the face of it, to be executed according to the terms of the articles, and which has to it a seal which purports to be the seal of the company, that seal being put by three persons who represent themselves to be directors, and who are *de facto* directors, and countersigned by the person who was *de facto* secre-

7 HL 88

L. J. G.
1870
In re COUNTY LIFE ASSURANCE COMPANY.

tary. I do not hesitate to say that the business of companies of this description could not possibly be carried on if this was not held to be the law. I must therefore dismiss this application with costs.

Solicitors: Messrs. *Bell & Steward;* Mr. *Donnithorne.*

L. J. G.
1870
Jan. 31.

In re PATENT PAPER MANUFACTURING COMPANY.

ADDISON'S CASE.

Company—Winding-up—Contributory—Conditional Allotment of Shares—Lapse of Time—Laches.

14 Eq. 392–5
9 Ch. 57
L. 698.
1 Ch. D. 669.

A., being desirous of lending money to a company, accepted 100 shares of £5 each, and paid £500, the whole amount of calls due thereon, upon condition that if he gave notice within a certain time his money should be repaid and the shares cancelled. He afterwards gave notice in pursuance of the agreement, and thereupon the money was repaid to him, and he executed a transfer of the shares to a nominee of the company, and his name was removed from the register of shareholders. Eight years afterwards the company was wound up:—

Held (affirming the decision of the Master of the Rolls), that *A.* was a contributory.

THIS was a summons by Mr. *Joseph Addison* that his name might be removed from the list of contributories of the *Patent Paper Manufacturing Company, Limited.*

The company was registered in December, 1856, under the *Joint Stock Companies Act* of that year. The capital was £30,000, divided into 6000 shares of £5 each.

In the begining of 1858 one of the directors of the company applied to Mr. *Addison* to become a shareholder, and, on his refusal, further asked him to lend money to the company, which he agreed to do. He accordingly, on the 3rd of February, 1858, wrote to the directors stating his willingness to lend the company money.

On the 4th of February, 1858, this letter was laid before the board of directors, and their proceedings thereon are described in the following minute of that date:—

"Mr. *Addison's* letter of the 3rd inst. was read, and it was resolved, that, subject to the approval of the board, the directors be authorized to negotiate with parties for the investment of capital in shares of this company, on condition of such shares being cancelled and the amounts so invested therein being returned to the parties on their giving notice of their requiring the same to be done one calendar month previous to the 31st of December, 1859. Resolved, that this company receive from any of the shareholders willing to advance the same, all, or any part, of the moneys due upon their respective shares beyond the sums actually called for, and that upon the moneys so paid in advance, or so much thereof as from time to time shall exceed the amount of the calls then made upon the shares in respect of which such advance shall be made, the company shall pay from time to time as interest an amount equal to that which would have been due had the moneys so paid in advance been called for on the shares in respect of which such advances shall have been made."

These resolutions were communicated to Mr. *Addison*, and he applied for 100 shares in the company, upon the terms stated in the following minute, which bore date the 9th of February, 1858:—

"The secretary reported that Mr. *Joseph Addison*, of *Basingstoke*, had applied for 100 shares in this company on condition that the said shares should be cancelled and the amount of all calls paid in respect thereof should be returned to him on the 31st of December, 1859, in the event of his giving one calendar month's previous notice of his desire to that effect. Mr. *Addison* also expressed his willingness to pay the full amount of £5 per share on the said 100 shares on the conditions of the resolution of the board of the 4th inst., whereupon it was resolved, that 100 shares in this company be allotted to Mr. *Addison* on the terms of his proposal as above, and that the directors be, and they are hereby authorized to sign on behalf of this company, all such letters of guarantee to Mr. *Addison* for the fulfilment of the stipulated conditions as they may be advised to be necessary."

In pursuance of this resolution 100 shares were allotted to Mr. *Addison*, and he signed an absolute acceptance of them, and paid £500 to the company in respect thereof.

L. J. G.
1870

ADDISON'S CASE.

Subsequently Mr. *Addison* gave notice that he required repayment of the £500, and the directors repaid that sum to him accordingly, and he, on the 31st of December, 1859, executed a transfer of his shares to one *William B. Law*, a nominee of the directors, for and on behalf of the company. In the return of shareholders filed with the Registrar of Joint Stock Companies for the year 1860, it was stated that Mr. *Addison* had transferred his shares on the 31st of December, 1859, and his name did not appear in any subsequent return.

In 1869 resolutions were passed for the voluntary winding up of the company; and the winding-up was afterwards continued under the supervision of the Court.

The articles of association authorized the company to receive from shareholders willing to advance the same all or any part of the moneys due upon their respective shares beyond the sums actually called up; but did not authorize the investment of the funds of the company in the purchase of its own shares.

The Master of the Rolls held that *Addison* was a contributory in respect of 100 ordinary shares. From this decision *Addison* appealed.

Mr. *Swanston*, Q.C., and Mr. *Higgins*, for the Appellant:—

The transaction was either *intrà vires* or *ultrà vires*. It may be contended that it was within the powers of the directors to make such an arrangement, for it was reasonable in itself, and was not expressly forbidden by the articles. If so *cadit quæstio*. If it was *ultrà vires* it was void *ab initio*, and *Addison* was never a shareholder at all. The company cannot say that it was *intrà vires* for the directors to accept his offer coupled with a condition, but *ultrà vires* to give effect to that condition: *Saunders' Case* (1); *Elkington's Case* (2); *Pellatt's Case* (3); *Stace and Worth's Case* (4). If his name is placed on the register it must be for fully paid-up shares, for when the shares were allotted to him he paid £5 on each. If the transaction is divisible, that part of it must be held good, and the repayment of the money by the directors was in their own wrong. The time which has elapsed since *Addison* was on the

(1) 2 D. J. & S. 101. 10 Jur NS 246
(2) Law Rep. 2 Ch. 511.
(3) Law Rep. 2 Ch. 527.
(4) Ibid. 4 Ch. 682.

L. J. G.
1870

ADDISON'S CASE.

register is, in itself, a bar to the present claim against him: *Parsons' Case* (1).

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for the official liquidator, were not called on.

SIR G. M. GIFFARD, L.J.:—

This is a case of great hardship, and if, consistently with the law, I could release Mr. *Addison* I should be glad to do so. As to the lapse of time, I am bound by the decisions of the House of Lords in *Spackman* v. *Evans* (2), and the other cases arising out of the *Agriculturist Cattle Insurance Company*. It is said, that in this case, if Mr. *Addison* became a shareholder, it was for fully paid-up shares. There is no pretence for that suggestion. It was a mortgage of ordinary shares. The cases cited do not apply. In *Saunders' Case* (3) it was held that *Saunders* never had any interest at all in the shares; in *Stace and Worth's Case* (4) the shares were allotted as part of an agreement which was entirely void from the beginning. In the present case the facts are these:—[His Lordship then shortly referred to the facts as stated above, and continued:—]

The result of this transaction was, that *Addison* contracted with the company that he should lend the company a sum of money, and that shares should be transferred into his name; and if he gave notice within a certain time the shares were to be given back. This contract carried with it a certain consequence, namely, that *Addison* was to be put on the register; and the law undoubtedly is, that a person who is once a shareholder must remain a shareholder until he can shew that he has in some lawful way got rid of his liability. Suppose that the company had been wound up while *Addison* remained on the register, while he was still a mortgagee, would he not have been liable? Unquestionably he would. If so, the only question is, whether his name has been lawfully removed from the register. The company had no power to cancel shares, nor to buy up shares, but what *Addison* did, was to transfer these shares to a trustee for the

(1) Law Rep. 8 Eq. 656.

(2) Ibid. 3 H. L. 171.

(3) 2 D. J. & S. 101.

(4) Law Rep. 4 Ch. 682.

10 Jur N.S. 1246

L. J. G.
1870
Addison's Case.

company, that transfer could be of no avail; his liability is exactly the same as if his name had remained on the register till the winding-up commenced. The appeal must, therefore, be dismissed with costs.

Solicitor for the Appellant: Mr. *J. H. Scott.*
Solicitors for the Official Liquidator: Messrs. *Kimber & Ellis.*

L. J. G.
1870
Jan. 31.

8 Ch 267

In re ASIATIC BANKING CORPORATION.

SYMONS' CASE.

Company—Contributory—Infant Transferee—Termination of Infancy after Commencement of Winding-up.

Where shares had been transferred to an infant, and his name had been placed on the register, the company being ignorant of the fact of his infancy, and he did not come of age till after the commencement of the winding-up:—

Held (affirming the decision of *Stuart*, V.C.), that the official liquidator might refuse to accept him as a shareholder, although after coming of age he were willing to confirm the transfer.

Castello's Case (1) approved of.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* made in the winding up of the *Asiatic Banking Corporation, Limited.*

The company was incorporated in 1864 for the purpose of carrying on the business of bankers in *India,* with an office and board of directors also in *London.*

On the 29th of August, 1866, a shareholder named *Nusserwanjee* transferred twenty shares into the name of *Bromley Symons.* On the 30th of August, 1866, another shareholder named *Hobbibhoy* transferred eighty shares into *Symons'* name, and on the 10th of September, 1866, the *Brokers' Loan and Discount Company* transferred forty other shares into his name. At this time *Bromley Symons* was a few months under the age of twenty-one years.

By the articles of association no transfer could be registered until approved by the directors; but the directors in *India,* where the transfers to *Symons* were made, being ignorant of his infancy, no objection was made to him, and the shares were registered in his name.

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(1) Law Rep. 8 Eq. 504.

On the 3rd of November, 1866, an order was made to wind up the company, on a petition presented on the 5th of October, 1866.

On the 12th of January, 1867, *Symons* attained the age of twenty-one years.

A question arose in the course of the winding-up, whether the transfers were not invalid, inasmuch as they were not approved by the board of directors in *London;* in consequence of which the official liquidator placed the names of the transferors on the list of contributories instead of that of *Symons;* but *Symons*' name was substituted for them by an order of the Vice-Chancellor, made in November, 1868.

The official liquidator at that time was not aware of *Symons*' infancy, but having discovered that fact, he obtained an order to have *Symons*' name removed; and the Vice-Chancellor subsequently, on the 16th of December, 1869, made an order placing the transferors on the list in his place. From this order the transferors appealed.

There was no evidence that *Symons* had done anything since he came of age to confirm the transfer, but it was stated at the bar that he was ready to do so, and that evidence could be procured, if necessary, to that effect.

Mr. *Karslake,* Q.C., and Mr. *Cottrell,* for the Appellants:—

The Vice-Chancellor decided the case on the same principle as he had decided *Castello's Case* (1), namely, that the *status* of the transferee must be taken to be settled at the date of the winding-up. But that principle has never been recognized by the Court of Appeal. A contract with an infant is not void, but only voidable, and the infant on coming of age can confirm it. How can the order for winding up alter the law in this respect? If *Symons* had gone to the official liquidator and insisted on his name being continued on the list, the official liquidator could not have refused to retain it. We are ready to produce evidence, if opportunity is given us, that he is willing to confirm the contract; and if he does so, the contract is binding on both parties *ab initio.*

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(1) Law Rep. 8 Eq. 504.

L. J. G.
1870
SYMONS' CASE.

[They referred to *Curtis' Case* (1); *Reid's Case* (2); *Lumsden's Case* (3); *Capper's Case* (4); *Mann's Case* (5); *Parsons' Case* (6); *Wilson's Case* (7); *Litchfield's Case* (8); *Henessey's Executors Case* (9)].

Mr. *Dickinson*, Q.C., and Mr. *Kekewich*, for the official liquidator, were not called on.

SIR G. M. GIFFARD, L.J.:—

This is an appeal from an order of Vice-Chancellor *Stuart* directing the name of the Appellants to be put upon the list of contributories in the place of *Bromley Symons*. The facts of the case are very simple, and are not in dispute. *Bromley Symons* was an infant at the time of the winding-up. The transfers to him took place in August and September, 1866. The company was ordered to be wound up on a petition presented in October, 1866, and *Bromley Symons* attained the age of twenty-one on the 12th of January, 1867. The order was made by the Vice-Chancellor upon the application of the official liquidator. He had nothing to do, and I have nothing to do, with what the relative rights of the Appellants and Mr. *Symons* may or may not be; nor would it make the slightest difference if I had before me now the evidence, which I have not, of Mr. *Symons*' confirmation of all that has been done. I take the Vice-Chancellor, with reference to the facts both of *Castello's Case* (10) and of this case, to have been perfectly accurate in what he said, viz., that the winding-up fixes the *status* of the contributory. The principle is as simple as possible, viz., that a man who executes a transfer of shares remains liable unless and until there is on the list a transferee who is legally liable to the company; and you take, for the purpose of ascertaining whether the transferor has or has not provided such a transferee, the date of the winding-up.

The utmost that is said in this case is, not that the liquidator has consented to any confirmation, or is bound by any confirmation, but that *Symons* himself either has confirmed, or will confirm, the transfer. But stopping there for a moment, suppose you had this company still in existence, and the Appellants, together with *Bromley Symons*, had sent their transfer to the company, they not knowing that *Bromley Symons* was an infant at the date when either of these transfers was sent to them. As a matter of course, when they first knew that *Bromley Symons* was an infant, if they sent to the transferor and said, "We shall apply to put your name on the list and to take Mr. *Symons*' name off," they would have been entitled to do that, and upon a motion they could have put the one name in the place of the other; for this simple reason, that it required two things to make the transfers valid: not only the confirmation of *Bromley Symons,* but also the acceptance of that confirmation, either implied or actual, on the part of the company. When you examine the facts here there has been no acceptance by the official liquidator, and nothing done by the official liquidator which precludes him from saying that *Symons* never was a proper transferee, and not being a proper transferee, that the persons who purport to have transferred to him ought to be on the list of contributories. The only fact that is stated to the contrary of that is the order which was made on the 18th of December, 1868, and that order was made at a time when the parties who had to do with the making of it knew nothing of the infancy of *Symons.* I am, therefore, clearly of opinion that it was open to the official liquidator to say whether he would or would not accept the confirmation by *Symons.* His confirmation without that acceptance is just so much waste paper, and it is clear, upon the authority of *Curtis*' *Case* (1), and others, that the Appellants ought to be on the list, the official liquidator desiring it, and that *Symons*' name ought not to be there. The appeal must therefore be dismissed with costs.

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(1) Law Rep. 6 Eq. 455.
(2) 24 Beav. 318.
(3) Law Rep. 4 Ch. 31.
(4) Ibid. 3 Ch. 458.
(5) Ibid. 459, n.
(6) Law Rep. 8 Eq. 656.
(7) Ibid. 240.
(8) 3 De G. & Sm. 141.
(9) Ibid. 191.
(10) Law Rep. 8 Eq. 504.

Solicitors: Messrs. *Freshfield*; Mr. *W. R. Harris.*

(1) Law Rep. 6 Eq. 455.

L. J. G.
1870
Feb. 10.

In re CONSTANTINOPLE AND ALEXANDRIA HOTEL COMPANY.

EBBETTS' CASE.

Company—Contributory—Infant—Acquiescence—Ratification.

11 Eq 87.
7 Ch 118
8 Ch 46
19 Eq 588 59.
8 QBD 500

An infant applied for shares in a company, shares were allotted to him, and he was entered on the register. He attained his majority on the 8th of April, 1864, and the company went on till June, 1865, when an order for winding it up was made. During this period, though he did not appear to have acted as a shareholder, he never took any step to repudiate the shares:—

Held, that he was bound by his acquiescence and must be placed on the list of contributories.

The decision of the Master of the Rolls affirmed.

THIS was a motion by way of appeal from a decision of the Master of the Rolls, refusing to remove the name of the Appellant from the list of contributories of the *Constantinople and Alexandria Hotel Company, Limited.*

The Appellant *Ebbetts*, on the 9th of November, 1863, being then an infant, sent in an application for 150 shares. It was strictly proved that letters of allotment to the applicants in a certain list (including a letter of allotment of 150 shares to *Ebbetts*) were posted to the proper addresses, on the 21st of December, 1863. *Ebbetts* attained the age of twenty-one on the 8th of April, 1864. It was further proved, that a letter threatening legal proceedings for default in payment of calls was posted to him at his proper address, on the 25th of July, 1864, and there was evidence, though not quite so precise, of other applications for calls having been made to him by writing.

In June, 1865, an order to wind up the company was made. The Appellant's name was on the register, but he disputed his liability to be on the list of contributories, on the ground of his having been an infant when he applied for the shares. The official liquidator thereupon put in evidence a transfer from the Appellant to a person of the name of *Wood*, which had never been registered, and which was dated the 28th of July, "eighteen hundred and sixty f—." The Appellant deposed that it was executed in July, 1865, in consequence of his having seen a notice of an order to wind up the company. On these materials the Master of the Rolls held that his name must be on the list of contributories (1).

Ebbetts being dissatisfied with the way in which his case had been conducted, changed his solicitor, and now moved by way of appeal from this order. In support of the appeal he filed an affidavit stating that when he made the application for shares he was a clerk in a mercantile house, and made the application at the request of the managing clerk, and as a trustee for one *Alfred Elborough*, and without any intention to take shares on his own behalf, and that he never heard anything more about the company till July, 1865, when he received a notice to the effect that the company was in course of being wound up, and that his name would be put on the list of contributories. He further deposed that he had never received any notice that his application for shares had been accepted, that until he received the notice of July, 1865, he was wholly ignorant that he was alleged to be a member, and that as he never had received an answer to his application, he had been under the impression that it had not been accepted, and that he had nothing to do with the company. He further stated that on receiving the notice of July, 1865, he went to *Elborough*, who said that the Appellant ought not to have been troubled about the shares, and stated, that if the Appellant would execute the transfer, he should be released from all further liability. The Appellant deposed that he thereupon, without any professional advice, executed the transfer without any intention of ratifying his application for shares. The managing clerk, who had asked

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(1) 1869. Dec. 10. [illegible]
Lord Romilly, M.R. :— 18 W.R. 262

I am not aware of any case in which an infant has been relieved from shares which have been allotted to him on his own personal application. An infant can bind himself by fraud, and if the Court came to the conclusion that an infant had applied for shares with the intention of keeping them if the company succeeded, and repudiating them on the ground of infancy if it did not succeed, he would probably be held fixed with the same liabilities as if he had been of age when he applied for them. But be that as it may, it appears to me that the execution of the transfer by *Ebbetts*, whether it was executed before or after the winding up order, is a clear admission of ownership, and a confirmation of the transaction. The application to remove his name from the list must be refused with costs.

L. J. G.
1870
Ebbetts' Case.

the Appellant to apply for the shares, deposed to having asked him to apply for them on behalf of *Elborough*.

Mr. *Ince*, for the Appellant:—

No notice was sent to the Appellant that his application for shares was accepted. There was, therefore, apart from his infancy, no binding contract to take shares. The transfer of the shares after the winding-up order was void, even supposing them to belong to him; it was made in ignorance of his legal position, and cannot be held an affirmance of what was originally voidable. Election must be made by a person cognisant of his rights: *Worthington* v. *Wiginton* (1), where the cases are collected.

[The Lord Justice desired counsel for the official liquidator to confine himself to the question whether any notice of allotment had been sent.]

Mr. *Bevir*, for the official liquidator:—

It is strictly proved that a letter of allotment, and a subsequent letter which was enough to inform the Appellant that he was on the register, were posted to him at his proper address, and there is some evidence of other notices having been sent to him. The Court will conclude that he received the letters and forgot them, rather than that they all miscarried.

Mr. *Ince*, in reply.

Sir G. M. Giffard, L.J.:—

When this case was before the Master of the Rolls, nothing was said about the Appellant's not having received any notice of allotment. If he did receive notice in due course the case is quite clear. It is true that when he applied for shares and when they were allotted to him he was an infant, but he attained the age of twenty-one years on the 8th of April, 1864, and the company went on till June, 1865, during the whole of which period he never in any way intimated to the company that he disputed his being a shareholder. I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register. As regards the question of fact, whether he received notice of allotment, I look with great suspicion on a case thus brought forward for the first time on appeal. There is distinct proof that letters of allotment were made out from a list containing his name and his correct address, and posted to the allottees, and that on two or three occasions letters of application to defaulting allottees were made out from a list also containing his name and address and were posted accordingly, and I am asked to believe that none of these letters reached him. I have no doubt that they were sent, and that at least some of them reached him. I must, therefore, hold that he received sufficient notice of allotment. This case illustrates the inconvenience of allowing a new case to be made upon an appeal motion, but I cannot alter the practice.

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(1) 20 Beav. 67. 1 Jur N S 1005, 1195.

Solicitors: Messrs. *Routh & Stacey*; Mr. *W. Rogers.*

In re GENERAL PROVIDENT ASSURANCE COMPANY.

L. J. G.
1870
Feb. 10.

BRIDGER'S CASE.

Company—Contributory—Conditional Agreement to take Shares—Collateral Agreement.

A person employed by a newly-established company as a local agent to induce persons to take shares, applied for shares in the company, on an understanding that he was to pay the calls out of the commission he received on shares disposed of by him, and was not to be otherwise liable for calls. His application was made for the avowed purpose of giving the company credit in his neighbourhood through his holding a considerable number of shares. He applied for shares by a letter in the usual form, accompanied by a letter referring to the conditions as to payment. Shares were allotted to him, and he was entered on the register:—

Held (affirming the decision of *Malins*, V.C.), that this was not a case of a conditional contract to take shares, but of an absolute contract coupled with a collateral agreement, and that the applicant was a contributory.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Malins* holding the Appellant *Bridger* to be a contributory of the *General Provident Assurance Company, Limited,* on the same

L. J. G.
1870
BRIDGER'S CASE.

grounds as in *Elkington's Case* (1). The facts of the case sufficiently appear from the judgment of the Lord Justice *Giffard*, and the report of the case before the Vice-Chancellor (2).

Mr. *Glasse*, Q.C., and Mr. *Alexander*, for the Appellant, relied on *Pellatt's Case* (3), *Shackleford's Case* (4), *Rogers' Case* (5), and *Simpson's Case* (6), and distinguished the case from *Elkington's Case* (7) and *Thompson's Case* (8).

Mr. *Cotton*, Q.C., and Mr. *Higgins*, for the official liquidator, were not called upon.

SIR G. M. GIFFARD, L.J.:—

This appears to me a very plain case. The facts have to be considered with reference to what was said by Lord *Cairns* in *Elkington's Case* (9). "It seemed to me throughout the argument that the real point for determination in this case might be said to be this: Did Messrs. *Elkington* intend and agree to become members and shareholders *in præsenti* with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did Messrs. *Elkington* agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?" In the present case *Bridger* had been a district agent and manager for the company at *Southampton* from May, 1866, at a salary, with a commission on shares disposed of by him. In September, 1866, communications took place, of which *Bridger* himself, in his affidavit, gives the following account:—

"In order to further induce the inhabitants of *Southampton* to take shares in the company the manager or secretary of the company, *Thomas Heywood*, represented to me that I ought to apply for shares, as, being a resident in *Southampton*, other inhabitants and residents in *Southampton*, seeing a large number of shares standing in my name, might place more confidence in the stability of the company, and become likewise shareholders. Accordingly, on or about the 5th day of September, 1866, I wrote to the said *Thomas Heywood*, offering to apply in my own name for shares upon condition that I should not pay either the application or allotment money, or any call that might be made in respect of the shares, but that all moneys which should become due and payable by me in respect of such shares should be deducted and retained by the company out of the sums I was entitled to receive for my commission on shares I disposed of as agent to the company." He goes on to say that he has not, and cannot obtain, a copy of the letter, but believes it to have been to the above effect. He then goes on to say that he received in reply the following letter from the secretary, dated the 7th of September, 1866:—

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(1) Law Rep. 2 Ch. 527.
(2) Ibid. 9 Eq. 74.
(3) Ibid. 2 Ch. 511.
(4) Ibid. 1 Ch. 567. 12 Jur NS 695
(5) Law Rep. 3 Ch. 633.
(6) Ibid. 4 Ch. 184.
(7) Ibid. 2 Ch. 511.
(8) 13 W. R. 958.
(9) Law Rep. 2 Ch. 522.

"'Dear Sir,—Yours of the 5th came duly to hand, but I was too busy yesterday to reply.

"'*Re* Shares.

"'I shall be most happy to receive your application for shares, allowing you the privilege of paying them up as convenient. Hoping soon to hear some good news from you,

"'I remain yours sincerely,
"'*Thomas Heywood*, Manager.

"Upon receiving such letter of the 7th day of September, 1866, I forwarded an application to the directors of the company upon the printed form used by the company for applications for shares, requesting them to allot me 100 shares in the said company. Accompanying my said application for shares I forwarded a letter in the words and figures following:—

"'Dear Sir,—I inclose my own application for shares, which I propose to pay from my commission on shares as sold. My taking shares, I find, will strengthen my arguments in canvassing for business.'"

Now, if that letter means that the Appellant was not to be a shareholder till he had earned enough commission to pay for the shares, it has any meaning rather than what it expresses. The Appellant then goes on to say:—

"I say that such letter of the 8th of September, 1866, formed part of my application for shares, and it was expressly agreed and understood between me and the manager and directors of the company that these 100 shares were to be allotted to me only as the means of inducing other persons residing in *Southampton* to place confidence in the company, and to apply for shares. It was never contemplated or agreed between me and the directors and manager of the company that I should pay any money for these shares either on application or allotment, or by way of calls; but it was expressly understood and agreed, and the sole condition upon which I applied for these shares was, that any money to become due upon these shares was to be paid for only out of my commission on shares sold by me as agent of the said company, but that I was not to be answerable personally, or be called upon to pay any money due, or to become due, in respect of my application for shares, exceeding any moneys which should become due and owing to me for commission on shares sold by me, and which the directors of the said company were authorized and empowered to retain as aforesaid."

That again fixes the meaning of the parties. *Bridger* was to become a shareholder *in præsenti* in order that the world might see him to be a shareholder, and that he might go about saying that he was one. His application for shares was made in the usual form, undertaking to accept the shares applied for, or any less number that might be allotted to him, and authorized the directors to enter his name on the register for the number of shares so allotted. He gave a written receipt for a certificate for the shares; his name was placed on the register; he attended two meetings as a shareholder, and signed a proxy as shareholder. There may have been an agreement that his calls were to be paid only in a particular way, but he agreed to be a shareholder *in præsenti*, and cannot be heard to say that he was not a shareholder because he had entered into that collateral agreement.

Solicitors: Messrs. *Kimber & Ellis*; Mr. *J. Emanuel.*

In re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte WILLIAMSON.

L. J. G.
1869
Dec. 17.

Benefit Building Society—Power to borrow—Ultrà vires Act—Winding-up Petition—Petitioning Creditor's Debt.

9 Eq 609, 6
614,
6 QB 27
[illegible]
— [illegible]
12 Eq 519
2 Ch D 7
5 C P D 3
6 QBD 7
19 Ch D 4
— 481
20 Ch D
21 Ch D 31
22 65 n
23 Ch D 44
446

A benefit building society has no power to borrow money unless its rules specially authorize it to do so.

The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a Petition for an order to wind up the company:—

Held (reversing the decision of the Master of the Rolls), that the transaction was *ultrà vires*, and that the Petitioner had no legal or equitable debt against the company, and the Petition was accordingly dismissed.

In re German Mining Company (1) distinguished.

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the *National Permanent Benefit Building Society* was ordered to be wound up.

The company was formed under the *Benefit Societies Act*, 6 & 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. *W. Richardson*, the secretary, was to provide a safe mode of investment for the funds of another society, called the *National Savings Bank Association*.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sums lent, until their turn arrives."

(1) 4 D. M. & G. 19. 18 Jur 710

L. J. G.
1869
In re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte WILLIAMSON.

In September, 1865, the *Building Society* borrowed £400 from the *Savings Bank Association*, which was forthwith advanced by the directors of the *Building Society* to a member on mortgage security; and the mortgage deed was deposited with the *Savings Bank*, and the contributions of the member paid into the *Savings Bank*. In January, 1866, the *Building Society* borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterwards the *Savings Bank* stopped payment, at which time they had advanced £1300 to the *Building Society*. The *Savings Bank Association* was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the *Building Society* as an unregistered company under Part 8 of the *Companies Act*, 1862. The order was made on the Petition of the official liquidator of the *Savings Bank Association*, who claimed to be a creditor for £1300 due to that Association.

A proof for that sum was afterwards admitted against the estate of the *Building Society*, and an order for a call was made upon the contributories for payment of it. From this order *J. W. Williamson* and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice *Giffard* it appeared that there was no debt due from the *Building Society* except the £1300 on which the winding-up Petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the *Building Society* were also promoters of the *Savings Bank Association*, and *J. W. Williamson* and some others of the Appellants were directors or otherwise office hearers in both companies.

Mr. *Roxburgh*, Q.C., and Mr. *Cottrell*, for the Appellants, contended that the directors had no power to borrow money, and consequently the debt incurred by them to the *Savings Bank* did not bind the company either at law or in equity. As there was no other debt, the winding-up order could not be supported. They referred to *In re Worcester Corn Exchange Company* (1); *Laing* v. *Reed* (2); *In re Kent Benefit Building Society* (3).

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the official liquidator, objected to the winding-up order being impeached so long after it had been made and acted on. Moreover, most of the Appellants were concerned in the formation of the *Building Society*, which was established for the very purpose of affording an investment for the funds of the *National Savings Bank Association*. They were directors or officers of both companies, and they could not now be heard to dispute the validity of the transaction. But, in truth, the money was borrowed for a perfectly legitimate purpose, namely, to make advances to the members; and although there was no power in the rules to borrow money, there was nothing to forbid it. The company had the benefit of the money borrowed; and were therefore liable in equity to repay it: *In re Cork and Youghal Railway Company* (4); *In re London and Mediterranean Bank* (5); *In re German Mining Company* (6).

SIR G. M. GIFFARD, L.J.:—

In point of form this is an appeal from an order of the Master of the Rolls, but in reality the point on which I am about to determine this case was never brought fairly, or argued, before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one, but before I go into it I will dispose of what Sir *Richard Baggallay* said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, especially if it has been shewn that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward

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17 Jur 721
(1) 3 D. M. & G. 180.
(2) Law Rep. 5 Ch. 4.
(3) 1 Dr. & Sm. 417.
7 Jur NS 1046
(4) Law Rep. 4 Ch. 748.
(5) Ibid. 3 Ch. 651.
(6) 4 D. M. & G. 19 18 Jur 710

L. J. G.
1869
In re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte WILLIAMSON.

the case, more especially as they are not the only contributories on the list, they being about nine out of a number of thirty-six. But, although I think the winding-up order ought not to have been made, I certainly shall give them no costs.

9 Eq 618

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the Court in *Laing* v. *Reed* (1), it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society shew that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans.

6 QB 270

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued, and by that prospectus the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives." If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the Petition of a creditor, and in order to support that Petition the Petitioner must have made out that he was a creditor, either legal or equitable—either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt, and if no legal debt, the next thing to inquire is, whether there was an equitable debt? A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company* (1) and *In re Cork and Youghal Railway Company* (2), the latter of which was before the Lord Chancellor and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow* v. *Pitfield* (3), where there was a loan to an infant, and the money was spent in paying for necessaries, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

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(1) Law Rep. 5 Ch. 4.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say, that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the *Savings Bank Association* that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they have any such rights, they can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am, therefore, of opinion that there is no legal or equitable debt. The winding-up Petition is in the nature of an execution

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(1) 4 D. M. & G. 19. [illegible] 710

(2) Law Rep. 4 Ch. 748.

(3) 1 P. Wms. 558.

L. J. G.
1869
In re
NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte WILLIAMSON.

against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from shewing that the title of the creditor to sustain a winding-up Petition totally fails, as it does in this case. The consequence is, that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.

Solicitors: Messrs. *Brady & Son*; Messrs. *Lewis, Munns, & Co.*

L. J. G.
1870
Feb. 8.

In re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST.

FERNANDES' EXECUTORS CASE.

Probate—Foreign Creditor—Bona notabilia—Payment to Foreign Executor.

19 Eq 521.

A chartered bank, whose head office was in *England* but whose business was chiefly carried on in *India*, was ordered to be wound up, and the Indian assets were remitted to this country. A creditor domiciled in *India* proved his debt, received a dividend and died, leaving a will which was proved in *India*. After his death a final dividend became payable:—

Held (reversing the decision of the Master of the Rolls), that the dividend ought not to be at once remitted to the executors in *India*, but could only be paid to them on their producing a properly stamped English probate.

THIS was an appeal motion by the Commissioners of Inland Revenue to discharge an order made by the Master of the Rolls.

The *Commercial Bank Corporation of India and the East* was constituted on the 19th of February, 1864, by royal charter, under which the company was to be managed by a board of directors in *London*, and its head office was to be in *London*. A Mr. *Fernandes* of *Bombay* was a creditor of the company to an amount exceeding £6000 on a deposit note issued by the *Shanghai* branch of the corporation. A winding-up order was made on the 28th of May, 1866, and early in 1867 a sum of about £400,000, being the Indian assets of the company collected at *Bombay*, was remitted to this country and placed as usual to the credit of the official liquidator at the *Bank of England*. Mr. *Fernandes* died in

L. J. G.
1870

FERNANDES' EXECUTORS CASE.

Bombay and domiciled there in May, 1867, having received a dividend of 10*s.* in the pound on his debt. On the 20th of May, 1867, he made his will according to the law of *Bombay*, and it was duly proved in *Bombay* by all the executors. In July, 1869, a final dividend of 7*s.* in the pound became payable. The executors, who had not proved the will in *England*, took out a summons, asking that the official liquidator might be directed to transmit to them at *Bombay* the amount of the final dividend (£2189 18*s.*), or to pay it to a person in *England* to whom they had given a power of attorney to receive it. The Master of the Rolls directed the summons to be served on the Commissioners of Inland Revenue, and after hearing counsel for the Crown, made an order directing the official liquidator, out of the assets of the corporation, to remit the dividends due to the applicants as the executors of *F. Fernandes* to them at *Bombay* at their expense, without requiring probate of the will of *Fernandes* to be taken out in *England* (1).

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(1) 1869. Dec. 13. LORD ROMILLY, M.R.:—/ W.N. (1869) 255

The question in this case is, whether I can properly order a sum of money which is due as a dividend to be paid in *India* to the legal personal representatives of the creditor under an Indian probate. The creditor, a person domiciled in *India*, proved his debt, and received a dividend. Since then he has died in *India*, his property is in *India*, his executors are in *India*, and they have proved his will in *India*. The winding up of the company has taken place here, there is now a further dividend to be paid, and the question is, whether the executors must take out probate here, or whether I can direct the official liquidator to send them the money direct to *India*. The whole matter was in *India*; the money is not in Court; it is not necessary to go to the Accountant-General for it; and after considering the matter very fully I think I may direct the official liquidator to remit to *India* to the executors the dividend which is due upon the debt. Of course the recipients must pay all the expenses arising from the necessity of taking it there, but I do not think it is incumbent upon me to require that they should take out probate here. Of course I have considered the case more attentively on account of the probability that there will be many cases of the same sort; and if it is a case which does not in fact relate to an Indian bank, then I should wish it to be mentioned to me again. I do not say what I should do if it were an English bank with branch establishments in *India*; but it appears to me that this corporation carried on business entirely in *India*, with this exception, that it had a branch here for carrying on business in *London*, and I do not think that the existence of that branch makes any difference. I think that it is essentially an Indian establishment, and that the Court of Chancery has been merely acting as ancillary to the Indian Courts for the purposes of the winding-up.

L. J. G.
1870
Fernandes' Executors Case.

Sir *Roundell Palmer*, Q.C., and Mr. *W. W. Karslake*, for the Attorney-General:—

This debt was a simple contract debt due from an English company, and therefore was *bona notabilia* in *England*, where the debtor resided: *Attorney-General* v. *Bouwens* (1); *Ex parte Horne* (2). When a company is being wound up here the claimant has to come to an English Court to establish his debt, and an English probate is necessary though the deceased creditor was domiciled abroad: *Partington* v. *Attorney-General* (3). Even a stop order cannot be obtained without duly stamped probate or letters of administration: *Christian* v. *Devereux* (4). The Court cannot look at anything but a duly stamped probate as evidence of a will. *Pearse* v. *Pearse* (5) turned on the fact that the debt was a foreign debt, which could not be sued for in this country. The Master of the Rolls appears to have made a confusion between liability to probate duty and legacy duty. The domicil of the claimant has nothing to do with the former: *Thomson* v. *Advocate General* (6). Under 55 Geo. 3, c. 184, ss. 2, 37, 38, 43, it is clear that probate duty attaches in respect of this sum and that the executors would be liable to a penalty if they did not pay it. *Lasseur* v. *Tyrconnel* (7), *Bond* v. *Graham* (8), *Tyler* v. *Bell* (9), all support our view.

Mr. *Bagshawe*, in support of the order:—

If a creditor dies domiciled abroad the proper and honest thing for the debtor to do is to remit funds abroad for the purpose of paying him, and not to wait to be sued here. A payment in *Bombay* to executors duly constituted there would be a good payment. I admit that if the executors had to sue here they must have an English probate; but why should they be put to sue here? It is said that the Court cannot look at the will until it is authenticated by an English probate, but I contend that we are entitled to prove that persons are duly constituted representatives in *Bombay*. The question is one of discretion. I do not deny that a debtor can refuse to pay and so compel the executors to

(1) 4 M. & W. 171.
(2) 7 B. & C. 632.
(3) Law Rep. 4 H. L. 100.
(4) 12 Sim. 264.
(5) 9 Sim. 430.
(6) 12 Cl. & F. 1
(7) 10 Beav. 28.
(8) 1 Hare, 482.
(9) 2 My. & Cr. 89.

take out English representation; but he is not obliged to do so, and I contend that the Court will not so oblige him. The liquidator is under no obligation to refuse to pay in order that the Crown may be enabled to recover probate duty.

SIR G. M. GIFFARD, L.J.:—

There seems unfortunately to have been a mistake before the Master of the Rolls, it having been supposed that this was an Indian company. When the charter is looked at, it is found to be, to all intents and purposes, an English company. The gentleman whose estate is now represented by the parties stated to be his Indian executors was domiciled in *India;* but he proved his debt here and he obtained payment of one dividend here. After that he died, and the state of things upon which I have to give a decision is this: The official liquidator, who is to all intents and purposes an officer of the Court, desires the direction of the Court as to whether he can or not safely pay this money to these persons who have obtained no probate in this country. Now, I apprehend that this proceeding can only be looked upon as in the nature of a judicial proceeding, and in my opinion the officer of the Court has no right to act upon any other evidence than such as the Court would itself act upon; and beyond all question the Court itself would only act on probate granted in this country. But the matter goes much further; for the Act 55 Geo. 3, c. 184, makes subject to a penalty every person who administers without first proving and paying certain duties. Now probate duty, as we all know, attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicil of the testator. The moneys now in question are *bona notabilia* in *London,* and I have no hesitation in saying that this Court cannot authorize the payment of them to a person who, if he were to receive them and administer them, would be going directly in the teeth of the Act of Parliament, and doing a thing for which, if the Crown chose to to proceed against him, he would be liable to a penalty. Upon these grounds I am obliged to say that there can be payment only upon production of an English probate.

Solicitors: Messrs. *Tucker, New, & Langdale;* Solicitor of Inland Revenue.

L. J. G.
1870
Feb. 14.

In re PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY.

Debenture Holder—Charge on "the Undertaking"—Property of the Company—Winding-up.

10 Eq 383,
6 PC 269
2 Ch D. 338, 342
10 Ch D. 535, 549
2 Ch D. 709
4 Ch D. 860-2

A steamship company, having power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging the "undertaking, and all sums of money arising therefrom," with the repayment at a specified time of the money borrowed, with interest in the meantime. Before the debentures became due the company was wound up, and the ships and other property of the company were sold:—

Held (affirming the decision of *Malins*, V.C.), that the debenture holders acquired a charge upon all the property of the company, past and future, by the term "undertaking;" and that they were entitled to be paid out of the property of the company in priority to the general creditors:

Semble, that, even if the company had not stopped, the debenture holders might have filed a bill to realize their security.

Gardner v. *London, Chatham, and Dover Railway Company* (1), distinguished.

THIS was an appeal from an order of Vice-Chancellor *Malins*, made in the winding up of the *Panama, New Zealand, and Australian Royal Mail Company, Limited.*

The company was incorporated under the *Companies Act*, 1862.

The articles of association contained the following power:—

The board of directors may from time to time make, accept, or indorse, or cause to be made, accepted, or indorsed, on behalf and in the name of the company, in such manner as they may from time to time direct, bills of exchange and promissory notes, provided the same be not made payable to bearer on demand, and may also from time to time borrow money for the purposes of the company, either upon mortgage of the whole or any part of the property or effects of the company, or upon bonds or debentures of the company, or upon such other security, and upon such terms and conditions as they may from time to time think fit.

In the month of June, 1866, the company, being desirous of borrowing £100,000, in addition to £50,000 which they had previously borrowed on the like security, issued a prospectus, in which

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(1) Law Rep. 2 Ch. 201.

L. J. G.
1870
In re
Panama, New Zealand, and Australian Royal Mail Company.

they stated their desire to raise that sum by debentures payable at terms not exceeding seven years, and stated the condition of the company in the following terms:—

"The subscribed and called-up capital of the company is £433,000.

"The property of the company consists principally of fifteen steam vessels of 12,500 tons register in the aggregate, and 2600 horse-power nominal, and also of sailing and coal ships, representing a tonnage of 8000 tons. The cost of this fleet amounts to upwards of £525,000, and the company possess other available assets of the value of about £50,000; ample security is therefore offered to the debenture holders. The subsidy receivable by the company for the *Panama* service is £110,000 per annum, the amount being irrespective of subsidies for local mail services in *New Zealand*, and between that colony and *Australia*, which during the past year amounted to £40,000."

Mr. *J. E. Naylor* having received one of these circulars, took five debentures of £100 each, on behalf of himself and Mr. *T. H. Stokoe*, for which he paid £500.

Each of the debentures was in the following form:—

"The *Panama, New Zealand, and Australian Mail Company, Limited.*

"Mortgage Debenture.

"No. 404. £100.

"By virtue of the powers contained in our articles of association we, the *Panama, New Zealand, and Australian Royal Mail Company, Limited,* in consideration of the sum of £100 paid to us by *J. E. Naylor*, of, &c., and the Rev. *T. H. Stokoe* of, &c., are held and firmly bound, and do hereby for ourselves, our successors and assigns, charge the said undertaking, and all sums of money arising therefrom, and all the estate, right, title, and interest of the company therein, with the payment to the said *J. E. Naylor* and *T. H. Stokoe,* their executors, administrators, or assigns, of the said sum of £100, together with interest for the same at the rate of £6 per cent. by the year, the principal sum to be repaid on the 2nd of January, 1870, and the interest to be payable in the meantime half-yearly, on the 1st of January and the 1st of July in each year, until the repayment thereof. Given under our common seal," &c.

L. J. G.
1870
In re
PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY.

Interest was duly paid on these debentures till the 1st of July, 1868, but no longer. Shortly afterwards, and before the debentures became payable, an order was made to wind up the company. The ships were sold under the winding-up, and Messrs. *Naylor* and *Stokoe* claimed a charge upon the proceeds of the sale in priority to the general creditors. The question was argued before the Vice-Chancellor on a summons taken out by the debenture holders, and His Honour decided in favour of their claim. The official liquidator, on behalf of the general creditors, appealed from this decision.

Mr. *Cole*, Q.C., and Mr. *Lindley*, for the Appellant:—

The case is governed by *Gardner* v. *London, Chatham, and Dover Railway Company* (1). Indeed, this is a stronger case, because in that case the document was a mortgage, and assigned all the undertaking to the debenture holder. In the present case the directors had power to raise money either by mortgages or debentures, and they have chosen to do so by a debenture in this form, in which there is no assignment, but simply a charge on the undertaking. This charge was granted after the case cited had settled the law that a mortgage of the undertaking does not pass the property of the company; and if the directors had wished to give a charge on the ships and other property of the company, they would have used apt words for that purpose. The true test whether the relation of mortgagor and mortgagee exists is the power of the mortgagee to prevent the mortgagor from removing the property: *Holroyd* v. *Marshall* (2). Here the debenture holder could not prevent the company from sending the ships out of the jurisdiction, or dealing with them as they pleased.

The word "undertaking" means enterprise, and it cannot be held to include property unless the context requires such a construction. All that was intended to be charged was the income of the company, which was then very considerable. The construction contended for by the Respondents would lead to an absurdity, for if all the property of the company were charged, it would include unpaid calls, and ships and coals which had been purchased after the date of the debenture, and even the money itself which was advanced by the debenture holders: *In re Marine Mansions Com-*

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(1) Law Rep. 2 Ch. 201.

(2) 10 H. L. C. 191. 9 Jur NS 213

pany (1); *Re State Fire Insurance Company* (2); *Russell* v. *East Anglian Railway Company* (3); *Wickham* v. *New Brunswick and Canada Railway Company* (4); *King* v. *Marshall* (5); *In re New Clydach Sheet and Bar Iron Company* (6); *Furness* v. *Caterham Railway Company* (7).

Mr. *Pearson*, Q.C., and Mr. *Hastings*, for the debenture holders, were not called on.

Sir G. M. Giffard, L.J.:—

This is an appeal from an order of Vice-Chancellor *Malins* by which he has declared that the mortgage debentures issued under the seal of the company are a charge upon the proceeds of the sale of the vessels and other property of the company.

Now, before going to the terms of the mortgage deed itself, I will first deal with the authorities which have been cited. The cases which relate to policies of insurance can have no application to the present, for the policies of insurance have a very different effect, and are of a very different nature, from these debentures. Neither has the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (8) any application to this, because in that case there was a peculiar subject matter on which the debentures operated—that is to say, a permanent railway, which it was well known to everybody was permanent, and could not be mortgaged, or sold, or dealt with in any way; and all that that case decided was, that in that particular instance, having regard to the position of the parties, there was a peculiar subject matter which was intended to be affected by the instrument, and no other. The same may be said of the other cases which relate to railways.

What I have to decide in the present case is simply this: What are the rights of the debenture holders, the state of things being that the concern is being wound up, and that the whole of its property is being realized? I confess that I can have no doubt whatever as to what the effect of the debenture is. In the first place, as regards the powers that were given to the company, there

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(1) Law Rep. 4 Eq. 601.
(2) 1 D. J. & S. 634.
(3) 3 Mac. & G. 104.
(4) Law Rep. 1 P. C. 64. 12 Jur. N.S. 534
(5) 33 Beav. 565. 10 Jur. N.S. 921.
(6) Law Rep. 6 Eq. 514.
(7) 27 Beav. 358. S.C. on app. 4 Jur. N.S. 1213.
(8) Law Rep. 2 Ch. 201.

L. J. G.
1870
In re
PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY.

was a power given to mortgage, and a power given to raise money by debentures; but, of course, they might include in one and the same instrument a mortgage and a debenture, that is to say, a mortgage and a bond. Accordingly they did issue what they called a mortgage debenture, which was, in substance, a bond, and a charge upon their property for the sum borrowed on bond. The form of the instrument is not an assignment but a charge; the company charge the undertaking, and all sums of money arising therefrom, and all estate, right, title, and interest of the company therein, with payment of the principal sum and interest. I asked in the course of the argument what could be the subject matter of that charge, and the answer given was, that there were valuable contracts, and that all that the charge was meant to cover was the income arising from the business being carried on, and that it would not extend to property, such as the ships and other property of that nature, which were absolutely essential to the carrying on of the concern. I cannot accede to any such proposition as that. I have no hesitation in saying that in this particular case, and having regard to the state of this particular company, the word "undertaking" had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company. And I take the object and meaning of the debenture to be this, that the word "undertaking" necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and that principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and, furthermore, that during the interval the debenture holder would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not refer to such things as sales or mortgages of property, but to the ordinary application of funds which came into the hands of the company in the usual course of business. I see no difficulty or inconvenience in giving that effect to this instrument. But the moment the company comes to be wound up, and the property has to be realized, that moment the rights of these

4 Ch. D. 562

L. J. G.
1870
In re
PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY.

parties, beyond all question, attach. My opinion is, that even if the company had not stopped the debenture holders might have filed a bill to realize their security. I hold that under these debentures they have a charge upon all property of the company, past and future, by the term "undertaking," and that they stand in a position superior to that of the general creditors, who can touch nothing until they are paid. The appeal, therefore, must be dismissed with costs.

Solicitors: Messrs. *Ashurst, Morris, & Co.*; Messrs. *W. & W. A. Waller.*

LAND CREDIT COMPANY OF IRELAND *v.* LORD FERMOY.

Ex parte MUNSTER.

L. J. G.
1870
Feb 8.

Cons. Ord. XXIX., *Rule* 6—*Writ of Fi. Fa.—Process to enforce Order—Service of Order.*

Service of a decree or order directing payment of money or costs is not requisite as a preliminary to issuing a writ of *fi. fa.* under Cons. Ord. XXIX., rule 6.

Where an order for payment of a sum of money is made against several persons, process can be issued separately against one of them, though the order is not in terms joint and several.

The decision of the Master of the Rolls affirmed.

Mar 14/77

THIS was a motion by the Defendant, *H. Munster*, by way of appeal from a decision of the Master of the Rolls, refusing to discharge a writ of *fi. fa.* for irregularity.

On the 24th of March, 1869, a decree was made (1), by which *Munster* and several other Defendants, directors of the *Land Credit Company of Ireland*, which was now being wound up, were declared jointly and severally liable to repay to the company the sums of £2000 and £1733 11*s.* 3*d.*, and it was ordered "that the said Defendants do pay the said sums on or before the 30th of June" then next, with interest from the date of the decree, to the company, and the defendants were also ordered to pay the costs of the company.

(1) Law Rep. 8 Eq. 7.

L. J. G.
1870
LAND CREDIT COMPANY OF IRELAND
v.
LORD FERMOY.
Ex parte MUNSTER.

The decree was passed and entered on the 10th of May, 1869. It was not served on *Munster*. On the 24th of November, 1869, the official liquidator, in the name of the company, sued out a writ of *fi. fa.* against *Munster* alone, under which his goods were taken in execution. He applied to the Master of the Rolls to discharge the writ, and His Lordship having refused the application, the present appeal motion was brought. [W R (1869) 259]

Mr. *Jessel*, Q.C., and Mr. *Hemming*, for the appeal motion:—

According to the old practice, service and demand were necessary before proceeding to enforce a decree. The necessity of a demand is done away with, but by Cons. Ord. XXIX., rule 1, service is necessary, and we contend that this rule, not being placed under any special heading, overrides all the subsequent parts of the order. Order XXX., rule 4, is also general, and makes service a necessary preliminary. The literal construction of Order XXIX., rule 6, which is acted upon in the office, leads to absurdity. According to it, if money was ordered to be paid in two months from the date of the decree, then, if the decree was passed and entered on the next day, a *fi. fa.* might be issued nearly a month before the time at which the money was ordered to be paid. This shews that the order cannot be read literally; it is implied that the person ordered to pay must be in default. Order XXX., rule 4, has to be read in connection with Order XXIII., rule 10; and similarly the rule as to issuing a *fi. fa.* must be construed with regard to the other rules. The old practice of the office is given in a note to *Seton* on Decrees (1). This was decided to be erroneous in *Adkins* v. *Bliss* (2), which proceeds on the principle for which we contend, that before the issuing of a *fi. fa.* the party must be in default, and the note referred to has been omitted in the subsequent edition of *Seton*. The contention on the other side was that the rule as to *fi. fa.* was an adoption pursuant to statute of the Common Law process, and must be governed by Common Law rules, which did not require service. But if this is so, the *fi. fa.* is bad on another ground, for it is settled at law that a writ against one under a judgment against several is bad, the right course being to issue the writ against all, and levy if desired only on one.

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(1) 2nd Ed. 648.

(2) 2 De G. & J. 286. 4 Jur NS 116

Sir *R. Baggallay*, Q.C., and Mr. *Shebbeare*, for the Plaintiff, were not called upon.

SIR G. M. GIFFARD, L.J.:—

I do not see any difficulty in this case. As regards the *fi. fa.* having been issued against *Munster* alone, it has been the practice in this Court to allow process to be issued separately against one of several persons against whom a joint and several order for payment has been made. Then as to the construction of the General Orders. Order XXIII., rule 10, provides that every decree or order requiring a person to do an act shall state the time within which it is to be done; and that on the copy to be served there shall be indorsed a memorandum in the prescribed form, indicating the process of contempt to which the party will be liable in case of disobedience. There is nothing in this relating to the issue of a *fi. fa.*, but only to the old process of contempt. If we then go to Order XXIX., rule 1, that rule is quite consistent with the prescribed form of indorsement, and requires service where a person is to be brought into contempt. Rule 3, then shews what are the several steps of process for contempt. Order XXX., rule 4, dispenses with what was formerly a necessary step in that process. Service is requisite in all proceedings founded on the old process of contempt; but in Order XXIX., rule 6, which was founded on the new remedy given by stat. 1 & 2 Vict. c. 110, which has no reference to the old process of contempt, service is not mentioned, and I see no reason for holding that it was intended to make service requisite. There is to my mind no difficulty in reading that rule; it was not intended that it should be overridden by rule 1, but that in issuing writs under it common sense should be exercised, so as not to issue them before the time at which the money was directed by the order to be paid. It is a difficult thing so to frame General Orders as to avoid difficulties of construction, but in the present case the effect of the orders appears to me quite plain.

Solicitors: Messrs. *Ward, Mills, & Witham;* Mr. *H. Gover*.

L. J. G.
1870
Jan. 15, 22.

Ex parte GREAVES. *In re* GREAVES.

10 Eq 58, 62

Creditors' Deed—Cancelling Registration—Bankruptcy Act, 1861, *s.* 192.

The Court has jurisdiction to order the registration of a deed of arrangement with creditors under sect. 192 of the *Bankruptcy Act*, 1861, to be cancelled.

Where a creditors' deed has been registered under the *Bankruptcy Act*, 1861, sect. 192, without having been assented to as required by the Act, the Court will not necessarily order the registration to be cancelled; but it will do so where the deed is fraudulent, and one to which the assenting creditors must be supposed to have assented on the assumption that it would not be registered unless the requisite amount of assents were obtained.

THIS was an appeal motion by *G. H. Greaves* to discharge an order of Mr. Commissioner *Thring*, directing the registration of a deed of arrangement between *Greaves* and his creditors to be cancelled and the certificate of registration to be revoked.

The deed in question was dated the 22nd of October, 1869. *Greaves* thereby agreed with his creditors to pay them 2*s.* 6*d.* in the pound on their respective debts before the 7th of February, 1870, and the creditors released him from their demands, subject to a proviso making the release void in default in payment of the composition. The deed contained a proviso that unless it should, before the 17th of November, be executed or assented to by a majority in number representing three-fourths in value of the creditors whose debts amounted respectively to £10 or upwards, it should be void.

The debtor was for many years a sergeant-major in a regiment of the line, and retired with a pension of £45 12*s.* 6*d.* In 1863 he was appointed adjutant to a volunteer regiment, a post bringing in about 15*s.* a day. His total income was thus raised to about £310 a year, including allowances for a horse and for some other military expenses. He was then in debt, and had a wife and eight children. The eldest son had for three years before the registration of the deed in question been in receipt of £250 a year as secretary to an insurance company; the second had a salary of £100 a year as clerk in a merchant's office. The eldest son paid his father £60 a year, and the second son paid him £40 a year, for board and lodging, exclusive of dinners. The eldest son had in 1866, and subsequently, made advances to pay some of his father's creditors, and it had been agreed that these loans should be repaid by means of the board and lodging. The second son had lent money to his father to the amount of £17 10*s.*, and was not of age at the time when the deed was registered.

The total amount of the debts not less than £10 was £587 4*s.*, so that the assent of creditors to the amount of £440 8*s.* was required. The creditors were sixteen in number, of whom eleven assented and five dissented. The eldest son was put down as an assenting creditor for £265 4*s.* 2*d.*, and the younger son for £17 10*s.* The amount of debts due to assenting creditors was £451 4*s.*, being only £10 16*s.* above the necessary amount. The eldest son, in the account shewing the balance due to him, had charged £28 18*s.* for interest on the advances made by him; but there was no written agreement for interest, and no evidence other than the father's own affidavit that there had ever been any agreement for interest. The debts under £10 amounted to £35 6*s.* 9*d.* The debtor's only property was his furniture, worth about £50.

An application having been made to cancel the registration, *Greaves*, on being examined before the Commissioner, said that he had entered into the composition with a view of relieving his eldest son. In an affidavit he subsequently stated the reason to be, that his eldest son wished to begin life on his own account, and was unwilling to lend him any more money, and that without assistance from his son he could not continue to pay his creditors.

The learned Commissioner considered the case to be governed by *In re Cowen* (1), *Ex parte Deacon* (2), and *Hart* v. *Smith* (3), and made the order under appeal.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the debtor, in support of the appeal motion:—

There is no jurisdiction to cancel the registration, which is not an act of the Court. Cancellation is unnecessary: *Ilderton* v. *Jewell* (4); nor does the statute provide means for doing it: *Ex*

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(1) Law Rep. 2 Ch. 563.
(2) Ibid. 4 Ch. 87.
(3) Law Rep. 4 Q. B. 61.
(4) 14 C. B. (N. S.) 665. 10 Jur N.S/747

L. J. G.
1870
Ex parte GREAVES.
In re GREAVES.

parte Page (1); *Ex parte Savin* (2); *Ex parte Ness* (3). Where an order is required under sect. 198, no doubt the Court might rescind that order; but where no order is necessary there is nothing to give the Court jurisdiction. *Re Wilde* (4) is only a Commissioner's decision, and we submit is erroneous. *Ex parte Calvert* (5) stands on quite a different footing, the deed being there part of the proceedings in bankruptcy. Then as to the reasonableness of the composition, the pay cannot be taken into account, for it is not assignable.

[The LORD JUSTICE GIFFARD:—Surely it must be taken into account where the question is whether the transaction was *bonâ fide.*]

A stipulation to pay out of it would be against public policy: *Ex parte Harnden* (6). If the decision of the Commissioner be upheld it will prevent every son from being treated as a *bonâ fide* creditor of his father. [*Ex parte Rawlings* (7) was also referred to.]

Mr. *Little*, Q.C., and Mr. *North*, for dissenting creditors:—

The language of the *Bankruptcy Act*, 1861, sect. 194, is affirmative, but that of 31 & 32 Vict. c. 104, is negative, and makes the conditions essential to the validity of the deed. Here there was no due consent of creditors. One son was an infant, and could not assent. Take his assent away, and there is not the requisite majority. No agreement to pay interest on the debts to the eldest son is proved. If we strike out the interest there is not the requisite majority. The registration of a deed gives the Court jurisdiction, and the Court must have control over it. In *Ex parte Ness* the registration was in no way an act of the Court. It does not appear that Lord *Westbury* in *Ex parte Page* meant anything more than that cancelling the registration was not necessary to enable a dissenting creditor to dispute the validity of a deed. In *Ex parte Savin* there was no adjudication on the point. The Lord Justice *Knight Bruce* intimated a clear opinion that registration might be cancelled, and the Lord Justice *Turner*, in the remarks which he made, appears to have overlooked the fact that registration did not make the deed binding unless other statutory requisitions were fulfilled. *Re Wilde* (1) is in point, and is entitled to great weight, as the decision of a Commissioner of great ability, and of great experience in bankruptcy law. The Court always assumed jurisdiction to supersede a bankruptcy before the Act of 1849, which was the first statute that in terms provided for it. A concerted adjudication was always annulled without any provision in favour of creditors who had proved under it. *Ex parte Prosser* (2); *Ex parte Brookes* (3); *Ex parte Battier* (4).

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(1) 1 D. J. & S. 283. 9 Jur NS 58
(2) Law Rep. 1 Ch. 616.
(3) 5 C. B. 155.
(4) 17 W. R. 368.
(5) 3 De G. & J. 95. 4 Jur NS 1258
(6) Ibid. 489. 5 Jur NS 852
(7) 1 D. J. & S. 225. 9 Jur NS 316

Mr. *De Gex*, in reply:—

Ex parte Stanford (5) furnishes an analogy against the power to cancel. If the registration be cancelled the deed cannot be produced in evidence, and so cannot be a defence against an assenting creditor, for to make it available it must be pleaded: *Rossi* v. *Bailey* (6). The cancelling the registration, therefore, would work great injustice, for whether the deed be good against dissenting creditors or not, assenting creditors ought to be bound.

SIR G. M. GIFFARD, L.J.:—

This is an appeal from an order of Mr. Commissioner *Thring*, directing the cancellation of the registration of a composition deed, and directing the revocation of the certificate granted upon the footing of that deed.

Now, first of all, we have to consider whether the facts are such as to justify the order under appeal being made, if there was jurisdiction to make it. I have no hesitation in saying that the facts are such, that if the Court has jurisdiction it ought unquestionably to make the order. The debts amount to between £500 and £600. The deed was executed on the 22nd of October, and its substance is, that the debtor is released from his creditors upon payment on the 7th of February then next of 2*s.* 6*d.* in the pound, or about £80 in the whole. The largest creditor is his eldest son,

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(1) 17 W. R. 368.

(2) Buck. 77.

(3) Ibid. 257.

(4) Buck. 426.

(5) 1 Q. B. 886

(6) Law Rep. 3 Q. B. 621.

L. J. G.
1870
Ex parte GREAVES.
In re GREAVES.

who assents to the deed, and whose debt is put down at £265 4*s.* 2*d.*, and when that debt comes to be examined it is made up in part of £28 18*s.*, in respect of interest, for charging which there is no ground whatever, the arrangement having been that the debt was to be worked out by board and lodging being provided by the father for the son, and no agreement for interest having been proved. It may be added that the avowed purpose of the deed was to save the son from what is said to be his necessity of contributing to the father's wants. Then we have the assent of the second son, who was an infant at the time he assented. His debt is small, but it is nevertheless a debt, and although he could not give an assent, it is a debt to be taken into account in ascertaining whether the requisite majority has assented, and his assent being void, it is clear that the requisite majority has not been obtained. But I go further, and say that under the circumstances I have mentioned neither of the sons gave or could give a valid assent, and to speak in plain terms, I hold this to be a fraudulent deed. Mr. *De Gex* has argued, that as the registration and the certificate are only *primâ facie* evidence of the validity of the deed, cancellation is not necessary for the protection of dissentient creditors, and that assuming the Court to have jurisdiction to cancel, it ought not to exercise this jurisdiction, as it would thus make the deed incapable of being produced in evidence as between the debtor and the assenting creditors. I do not say that in every case where a deed is bad as against dissentient creditors, the registration of that deed ought to be cancelled, but I do say that where a deed is fraudulent the registration unquestionably ought to be cancelled, if there is jurisdiction to cancel it, especially where no act has been done under the deed, and where every creditor must be taken to have assented on the supposition that a valid assent to the deed must be obtained, or that it could not be registered.

It only remains then to consider whether the Court has jurisdiction to cancel the registration and revoke the certificate. Certainly nothing that was said by Lord *Westbury* in *Ex parte Page* (1), and nothing that was said by Lord Justice *Turner* in *Ex parte Rawlings* (2), and *Ex parte Savin* (3), goes at all to decide that the Court

(1) 1 D. J. & S. 283. 9 Jur. N.S. 68 (2) 1 D. J. & S. 225. 9 Jur. N.S. 816
(3) Law Rep. 1 Ch. 616.

has not such jurisdiction, and I think it is absolutely essential that the Court should have it. The case of *Ex parte Ness* (1) stands on quite a different footing, for though the Master of the Common Pleas happens to be the person whose duty it is to register judgments, he does not register them as an officer of the Court of Common Pleas, or as being under the jurisdiction of that Court, nor does the judgment which he registers, unless it happens to be a judgment of the Common Pleas, form in any sense a record of that Court. Then again, as regards *Ex parte Stanford* (2) the registration of births and deaths has nothing to do with any Court at all. What we have to do with here is, first of all, a thing substituted for bankruptcy; secondly, a thing which is to form a record of that Court; and, thirdly, a thing on which that Court is to take action, for the 197th section of the Act provides that after the registration of every such deed the debtor and the creditor, and all parties, may come to the Court of Bankruptcy upon the footing of that registration, and take action and get judgment on almost every question that can possibly arise under the deed. The matter is a record of the Court, and it would be strange that the Court should not have jurisdiction over its own record. Moreover, the statute provides that when the registration has been entered, and the matter has become a record of the Court, a certificate shall issue, and that certificate is to issue under the seal of the Court, and to suppose that if a certificate of that description under the seal of the Court is obtained from the Court upon a fraudulent representation it cannot be recalled, is, in fact, to suppose that the Court cannot exercise the most ordinary jurisdiction. I have no hesitation in saying that where a matter is to be registered by an officer of the Court, who is amenable to the Court in respect of such registration, and where the thing to be registered is to be a record of the Court on which the Court has to act, and with reference to which the Court has duties to perform, the Court has jurisdiction, without its being given in express words by the Act of Parliament, to cancel that registration. With reference to *Re Wilde* (3), before the present Chief Judge in Bankruptcy, I may say, that, although he does not go into his reasons in his judgment, I have no doubt what-

(1) 5 C. B. 155. (2) 1 Q B. 886.
(3) 17 W. R. 368.

L. J. G. 1870 Ex parte GREAVES. In re GREAVES.

ever that the case was well considered before that judgment was given. I believe it is the unanimous opinion of all the Commissioners that this jurisdiction exists. In a case like the present it is a most proper and salutary jurisdiction. The appeal will be dismissed with costs.

Solicitors: Messrs. *Vizard, Crowder, & Co.;* Mr. *W. W. Wynne.*

L. J. G. 1870 Jan. 29.

Ex parte NICHOLSON. *In re* NICHOLSON.

Creditors' Deed—Bankruptcy Act, 1861, *s.* 192—*Inequality.*

By a deed expressed to be made between *N.* of the first part, *D.* (a creditor of *N.*) of the second part, and all *N.*'s creditors of the third part, and registered under sect. 192 of the *Bankruptcy Act,* 1861, *N.* and *D.* covenanted with all the other creditors for payment to them of a composition of 4*s.* in the pound on their debts; and all the creditors released *N.* from the original debts, subject to a proviso making the deed void on default in payment of the composition, and *N.* assigned over his property to *D.* absolutely:—

Held, that this deed was not on its face void as giving an undue advantage to *D.*

Bissell v. *Jones* (1) followed.

THIS was an appeal from an order of Mr. Registrar *Brougham,* refusing to dismiss a petition for adjudication, a deed of arrangement, which was relied on as a bar to proceedings in bankruptcy, being in his opinion invalid.

The deed in question was dated the 20th of December, 1869, and made between *Nicholson,* a contractor, of the first part; *J. Doulton, H. Doulton,* and *J. D. Doulton,* of the second part; and the creditors of *Nicholson* (expressly including the *Doultons*), of the third part; by which, after reciting a proposal for *Nicholson* to pay to the creditors in satisfaction of their debts a composition of 4*s.* in the pound, the payment of which to the other creditors was to be guaranteed by the *Doultons,* and reciting that *Nicholson* was possessed of or entitled to certain plant and stock, materials, horses and carts, used for the purposes of his business, and had been carrying on certain contracts, which were still pending, made by him with the Metropolitan Board of Works, and with the *West*

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(1) Law Rep. 4 Q. B. 49.

L. J. G.
1870
Ex parte
NICHOLSON.
In re
NICHOLSON.

Hove Commissioners, and with the trustees of the *Stanford Town Estate* at *Brighton*, and that it was part of the proposal that the plant, stock, and other chattels should be assigned to the *Doultons*, and the contracts be assigned to them, or dealt with as they should direct, the debtor and the *Doultons* jointly covenanted with each of the other creditors to deliver to the other creditors the joint and several promissory notes of *Nicholson* and the *Doultons* for payment to the several creditors of the composition on their several debts by such instalments and at such times as had been agreed upon. *Nicholson* then covenanted with the *Doultons* to give them his promissory notes for the amount of such instalments, such notes being made payable at the same times as the instalments. The creditors, including the *Doultons*, then released *Nicholson* from their debts, subject to a proviso making the deed void as against any creditors the promissory notes given to whom should not be duly paid. *Nicholson* assigned the stock and chattels absolutely to the *Doultons*, and covenanted with them to assign on request the contracts to them or any two or one of them, and in the meantime to deal with the contracts as they should direct.

This deed was duly registered under the 192nd section of the *Bankruptcy Act*, 1861. The *Doultons* were entered as creditors for £12,361, which was by far the largest debt, being considerably more than double the amount of the debts of all the other assenting creditors.

Shortly before the registration of this deed a dissenting creditor filed a petition for adjudication. After the registration *Nicholson* applied that the proceedings might be stayed, and the petition dismissed. The Registrar refused the application, being of opinion that the deed was invalid, as giving Messrs. *Doulton* a higher security than the other creditors, and he declined to refer the point to the Chief Judge. *Nicholson* appealed.

Mr. *De Gex*, Q.C., and Mr. *Doria*, for the appeal motions:—

This deed was framed on the authority of *Dewhirst* v. *Jones* (1), and its validity is supported by *Bissell* v. *Jones* (2), and *Wells* v. *Hacon* (3).

(1) 3 H. & C. 60. (2) Law Rep. 4 Q. B. 49. (3) 5 B. & S. 196. 10 Jur NS 863.

L. J. G.
1870
Ex parte NICHOLSON.
In re NICHOLSON.

[The LORD JUSTICE GIFFARD:—I do not at present see how to distinguish this case from *Bissell* v. *Jones* (1), but I feel some difficulty as to the *ratio decidendi*, and as I am not bound by that authority, I wish to hear the case argued on principle.]

The arrangement is not on the face of it void; it may be a very reasonable arrangement. It is true that the *Doultons* might in a particular state of the assets get paid in full, or even get more, but if the assets are small, they may not only get no dividend, but be out of pocket besides; and the latter alternative is, *à priori*, at least as likely as the other. Whether the arrangement, then, is reasonable, is a matter for the creditors to decide; the Court cannot decide whether such a deed is reasonable or not: *Ex parte Cowen* (2).

Mr. Serjeant *Sargood*, and Mr. *Bagley*, for the dissentient creditor:—

The cases cited do not govern this. In *Dewhirst* v. *Jones* (3) the surety was not a creditor. In *Bissell* v. *Jones* the assignment was in trust to pay creditors. Here the *Doultons* have property assigned to them, so that they get a substantial security; the other creditors get nothing but personal security, as the property is not impressed with any trust. Suppose the *Doultons* parted with *Nicholson's* assets, and then became bankrupt, his creditors would be without remedy. There must be equality between the creditors in order to make a composition deed binding: *Ex parte Cockburn* (4); *Thompson* v. *Knight* (5). It is against the policy of the Act that the *Doultons*, with their large debt, should be able to carry an arrangement like this. If, however, the Court be against us on the present materials, we wish an opportunity for further inquiry, as there are many bills of exchange in the list of debts, and we cannot ascertain whether the deed has been properly assented to.

SIR G. M. GIFFARD, L.J.:—

If I had dissented from the decision in *Bissell* v. *Jones*, I should

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(1) Law Rep. 4 Q. B. 49.
(2) Ibid. 2 Ch. 563.
(3) 3 H. & C. 60.
(4) 3 D. J. & S. 175. /6 Jur NS 57
(5) Law Rep. 2 Ex. 42.

L. J. G.
1870
Ex parte NICHOLSON.
In re NICHOLSON.

have taken time to consider this case, as a unanimous decision of the Court of Queen's Bench is entitled to great respect, but, after having heard the question discussed, I do not dissent from that decision. The only difference between the two cases is, that in *Bissell* v. *Jones* (1) the creditors got the security of the debtor's property for payment of their composition, and in this case they do not. I think, however, that this furnishes no sufficient distinction; for the question whether the creditors should require the security of the assets, or rest satisfied with promissory notes, is one which they may well decide for themselves. I agree that all deeds of this kind must deal equally with the creditors; thus, to put an extreme case, if a deed were simply to provide that one class of creditors should receive a larger composition than another, that could not bind dissenting creditors, for it would be on the face of the deed unfair; but I see nothing on the face of this deed from which I can infer that the arrangement was not fair, nor do I see that Messrs. *Doultons'* interest prevented their voting in favour of it. The creditors might be, and probably were, satisfied that they would not get more than 4*s.* in the pound by resorting to their legal remedies. I, of course, should have looked at the transaction very strictly if there had been any evidence tending to shew want of *bona fides.* The order must be reversed, with a statement of the opinion of the Court that the deed is not on its face invalid; but this is to be without prejudice to any objections to it that may arise from facts which may be brought forward in the course of further inquiry.

Solicitors: Mr. *J. Anderson Rose;* Messrs. *Lewis, Munns, & Co.*

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(1) Law Rep. 4 Q. B. 49.

L. C.
and L. J. G.
1870
Jan. 24, 25.

10 Ch 516
[illegible] 677

GIBBS *v.* HARDING.

Husband and Wife—Agreement for Separation—Specific Performance.

An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, decreed to be specifically performed.

Decree of *Stuart*, V.C., affirmed.

BY articles of agreement dated the 8th of July, 1865, and made between *T. A. Harding* of the one part and *J. Gibbs*, the father of *Harding's* wife, of the other part, after reciting that differences had arisen between *Harding* and his wife, it was agreed between *Gibbs* and *Harding* that *Harding* and his wife should live apart, and that *Harding* would execute and sign a deed of separation, to contain all usual and proper clauses, and also to secure the sum of £40 a year for the maintenance of the wife and her child; and that the costs of the deed of separation and of the agreement should be paid in equal portions by the parties to the agreement. The agreement was signed by *Gibbs* and by *Harding*, and also by *Harding's* wife.

A deed of separation was prepared by the solicitor of *Gibbs*, purporting to charge the annuity on some land belonging to *Harding*; but *Harding* refused to execute the deed, and thereupon the bill in this suit was filed, praying specific performance by *Harding* of the agreement. *Harding*, by his answer, alleged that the agreement was invalid, and also that he ought not to be called upon to charge his land.

The Vice-Chancellor *Stuart* made a decree directing specific performance of the agreement, and ordering a proper deed, to be settled by the Judge, securing the annuity, to be executed by the Defendant; as reported (1), where the facts of the case are more fully stated.

The Defendant *Harding*, appealed.

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(1) Law Rep. 8 Eq. 490.

Mr. *Dickinson*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

1. There is no covenant by the trustee to indemnify the husband, nor any agreement to execute any deed which shall contain such a covenant: *Walrond* v. *Walrond* (1). The agreement is that the husband should execute a deed, not that the trustee should.

2. The agreement points, although not in express terms, to depriving the husband of the custody of the child. This is contrary to the policy of the law: *Vansittart* v. *Vansittart* (2).

3. There is no agreement to charge the annuity on land or other property. Therefore the deed prepared is unreasonable: *Countess of Mornington* v. *Keane* (3).

4. If there is any remedy, it is at law.

Mr. *Greene*, Q.C., and Mr. *Bagshawe*, for the Plaintiffs:—

It is usual to have a covenant by trustees to indemnify the husband against the debts of the wife, and *Gibbs* is ready to give such a covenant, but it is not necessary: *Wilson* v. *Wilson* (4); *Hunt* v. *Hunt* (5). But, independently of that, a contract like this will be enforced where the husband and wife are in a hostile position: *Vansittart* v. *Vansittart*; *Williams* v. *Baily* (6). As to the security to be given for the annuity, the Plaintiffs do not ask any particular form, but the Defendant refuses to execute any deed at all; so that the question raised in *Countess of Mornington* v. *Keane* does not arise here. There is no provision that the wife shall have the custody of the child. We think the deed, as prepared by the solicitors of the Plaintiff, is sufficient, but we are willing to take a deed as settled by the Court, and in fact that direction in the decree was inserted at the request of the Defendant. *Wilson* v. *Wilson* went beyond this case. Moreover, if there was no other consideration, *Gibbs* has agreed to pay half the costs.

Mr. *W. W. Karslake*, in reply:—

There is nothing in the agreement to shew that *Gibbs*, or any-

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(1) Joh. 18. 4 Jur NS 1077
(2) 2 De G. & J. 249; 4 Jur NS 1519
(3) Ibid. 292. 4 Jur NS 981
(4) 1 H. L. C. 538; 5 H. L. C. 40.
(5) 4 D. F. & J. 221. 8 Jur NS 585.
(6) Law Rep. 2 Eq. 731.

L. C.
and L. J. G.
1870
GIBBS
v.
HARDING.

body else will covenant to indemnify the husband against his wife's debts, which is always necessary, and without which neither agreement nor deed can be enforced against the husband. The agreement to pay half the costs of a deed which cannot be executed is not sufficient as a consideration. The agreement must be taken to be voluntary unless it shews that there was consideration.

LORD HATHERLEY, L.C. :—

We are not called upon in this case to decide whether there could be an injunction on such an agreement, but only to decree specific performance of an agreement.

The Court would not execute an agreement without consideration, or an agreement between husband and wife without the intervention of a trustee, unless the husband and wife were at arm's length, as in the case of *Bateman* v. *Countess of Ross* (1). In *Wilson* v. *Wilson* (2), the agreement was with trustees and the question did not arise.

The wife in this case was not a party, though she signed the agreement; meaning thereby, as I apprehend, merely to testify her assent; and the Court looks at all agreements of this kind as being made independently of the wife.

The father of the wife, being competent to contract, agreed with the husband that the wife should live apart from her husband, and the husband agreed to execute a deed and to secure the payment of a certain sum on condition of a deed of separation being executed containing all usual and proper clauses; and if that is not done the husband is entitled to say that he will not secure the annuity.

The bill is now filed, asking that the husband may be decreed to execute a proper deed, and the deed prepared contains a covenant to indemnify the husband against the debts of the wife, which in all these cases is the consideration given to the husband, and this case does not go beyond *Wilson* v. *Wilson*. There is also the contract to pay the expenses of the agreement and deed, and this Court will certainly execute an agreement as to property founded on the circumstance that the husband and wife are to live apart. As to the child, it was but reasonable that an arrangement should be made for her maintenance, as she was under seven years of age.

(1) 1 Dow. 235.

(2) 1 H. L. C. 538; 5 H. L. C. 40.

The case is on all fours with *Wilson* v. *Wilson* (1), and as to the form of the decree, we are told that the direction as to the settlement of the deed by the Court was introduced at the desire of the Appellant.

As to costs: there was no contract for charging the annuity on real estate, and if the case rested there no costs would have been given; but the Defendant has insisted that there has been no contract, and that being so there will be no variation in the decree as to costs. The only alteration will be a direction that the deed is to be a deed of separation and that the costs of the deed are to be borne by *Gibbs* and by *Harding* equally.

Sir G. M. Giffard, L.J.:—

The only questions in this case are, whether there was a sufficient contract with sufficient consideration, and whether there was any illegality in contracting as to the maintenance of the child. I cannot doubt that there was a contract that the husband and wife should live apart and that *Gibbs* should pay half the costs of the agreement and deed; and I do not think that there is any illegality in the condition as to maintenance of the child. A separation deed containing all usual and proper covenants, must be prepared under the direction of the Court and executed by all proper parties. The Defendant must pay the costs of the suit and of the appeal, and the expense of the deed must be borne by *Gibbs* and *Harding* equally.

Solicitors for the Plaintiffs: Messrs *Few & Co.*, agents for Messrs. *Bradford & Foote, Swindon.*

Solicitor for the Defendants: Mr. *W. Moon*, agent for Messrs. *Townsend & Ormond, Swindon,*

(1) 1 H. L. C. 538; 5 H. L. C. 40.

L. C.
and L. J. G.

1870

Jan. 26.

13 ChD 226
— 390
20 ChD 201
21 ChD 578.9

EVANS *v.* BAGSHAW.

Partition—Reversioner—Practice—Pleading—Acquiring New Title—Amendment.

A tenant in common in reversion cannot maintain a suit for partition.

If a Plaintiff has no title to maintain his suit at the time when the bill is filed, he cannot carry on the suit by subsequently acquiring a title and amending the bill accordingly.

Decree of the Master of the Rolls affirmed.

THE original bill in this suit was filed by a married woman and her husband, and their mortgagee, for a partition of certain real estate, of which the married woman was tenant in common in fee in one-sixth. The Defendants, by their answer, stated, as was the fact, that the husband had been bankrupt before the mortgage was executed, and that all his interest in right of his wife was therefore vested in his assignees; and the Defendants submitted whether such a suit, being in fact a suit by the wife as reversioner, could be maintained. The mortgagee thereupon bought the life estate from the assignees of the husband, and the bill was amended by stating that fact.

The Master of the Rolls was of opinion that the original bill, being by a reversioner for a partition, could not be maintained, and that the Plaintiffs could not carry on the suit upon a title different from that which they originally stated; and he dismissed the bill with costs as reported (1).

The Plaintiffs appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Speed*, for the Plaintiffs:—

We admit the rule that the owner of a reversion cannot maintain a suit for partition. But there is no real reason for the rule; at law it probably prevailed, because the reversioner could not make a tenant to the præcipe; but this is a very peculiar case. It is true that the original bill was wrong, but the suit has been rendered maintainable by the amendment; and why, then, should the Plaintiffs be put to the expense of dismissing the bill and filing a fresh bill? *Attorney-General* v. *Portreve of Avon* (1) was a very different case. It is true that where a Plaintiff has no title at all he cannot amend by introducing a title on a new state of facts: *Pilkington* v. *Wignall* (2). But here the Plaintiffs had the inheritance, and had an interest. Suppose that the defect had not been known, and that the Court did, as often is done, direct an inquiry as to title, and it then appeared that the owner of this life estate was not before the Court, surely he could have been made a party by a supplemental bill, and the partition would have gone on.

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(1) Law Rep. 8 Eq. 469.

Mr. *Jessel,* Q.C., and Mr. *W. Pearson,* for the Defendants, were not called upon.

LORD HATHERLEY, L.C.:—

As regards the substance of the case, no doubt the Master of the Rolls was right. This bill was filed by a married woman and her husband, and their mortgagee, for a partition of real estate, of which she was tenant in common in fee in one-sixth. But her husband was a bankrupt before the execution of the mortgage, and all his interest was then vested in the assignees under the bankruptcy, so that the married woman was in effect the owner of a reversion only.

The case, therefore, falls within the ordinary rule that the Court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things. There might be a tenant for life of the whole, and several tenants in common in reversion, in which case the inconvenience would be obviously very great. At all events, the rule is unquestionably settled.

The objection was taken by the answer; then the mortgagee acquired the estate of the bankrupt, and he now says that he can maintain this suit; but there he is wrong, for it is settled that such a suit cannot be maintained. If the old practice had prevailed, and a supplemental bill had been filed, the matter would have been quite clear. We can only follow the decision of the Master of the Rolls, and we must dismiss this appeal with costs.

(1) 11 W. R. 1050.

(2) 2 Madd. 240.

L. C.
and L. J. G.
1870
EVANS
v.
BAGSHAW.

SIR G. M. GIFFARD, L.J. :—

In this case the Plaintiff might have dismissed his bill, and filed a new one; but as it is, unfortunately, we cannot make a decree. The rule is, that a reversioner cannot maintain a bill for a partition; and if a Plaintiff files a bill when he is not entitled to do so, he cannot afterwards acquire such a title as will enable him to maintain the suit. The appeal must be dismissed with costs.

Solicitors: Messrs. *Taylor, Hoare, & Taylor;* Messrs. *Burt, Stevens, & Cave.*

L. C.
and L. J. G.
1870
March 9.

SMITH *v.* SMITH.

Will—Class—Remoteness.

3 Ch. D. 645, 7
648
7 Ch. D. 696
700
1 Ch. D. 555,
558-9
5 App. Cas.
716-7, 8
727-8, 731
732-3, 4

Bequest of residue after the death of the testator's wife to the testator's children then living, and such issue then living of any children then deceased as should attain the age of twenty-three years as tenants in common according to the stocks and not to the individual objects, and so that the issue of deceased children might take by way of substitution the shares of their respective parents :—

Held, void for remoteness.

Decision of *Malins*, V.C., reversed.

Adopted by H of L Pearks v. Moseley W.N. (80) 137

JAMES SMITH, by his will dated the 3rd of January, 1866, devised his real estate to trustees on trust to pay the rents to his wife for her life; and he gave the sum of £7000 to trustees on trust to invest the same and to permit his wife to receive the annual income thereof; and also to pay unto or permit his wife to receive the annual income of his residuary personal estate until his children should respectively become entitled to their shares in the capital of the residuary personal estate under the devise thereof thereinafter contained, she his said wife maintaining, educating, and bringing up his children until they should respectively attain the age of twenty-three years; and after the decease of his wife upon trust to sell his real estate and convert his personal estate, and to pay and divide the money arising therefrom, and also the said sum of £7000, "Unto and equally between and among all such children of mine then living, and such issue then living of my child or children then deceased, as shall either before or after the death of my said wife attain the age of twenty-three years, as tenants in common in course of distribution according to the stocks, and not to the number of individual objects, and so that the issue of deceased children may take by way of substitution the share or respective shares only which the parent or respective parents would if living have taken." The testator further directed his trustees to stand possessed of the share of his daughter *Margaret*, upon trust to make a settlement thereof for the benefit of herself and her children as in the will mentioned.

The testator died in March, 1867, and a suit was instituted for the administration of his estate, in which suit several questions were raised, and amongst them, whether the gift of the residue was not void for remoteness.

The Vice-Chancellor *Malins* on the 27th of July, 1867, made a decree declaring that the bequest of the residue to the children living at the decease of the testator's wife, and attaining twenty-three years, was a valid bequest; but that the bequest to the issue living at the death of the wife was void for remoteness; and declaring the widow entitled to the income of the testator's residuary estate; but that she was entitled to the income of the expectant shares of the testator's children until such time only as the children respectively attained the age of twenty-three years, or died under that age; and that on their attaining the age of twenty-three they were or would be entitled to the income of their respective expectant shares for their own benefit (1).

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(1) 1867. July 27. The VICE-CHANCELLOR thought that the gift to the children was good. If it had been a gift to children and grandchildren who should attain the age of twenty-three, it would have been void as to both, because though the children would necessarily be ascertained in time, the grandchildren would not, and the gift to the whole class would fail. But this gift was not in that form. It was a gift as to all the testator's children who should survive the wife and attain twenty-three; that was a valid gift, and if all the children attained twenty-three and survived the wife then the substituted gift did not come in at all. If any child attained the age of twenty-three and predeceased the wife, leaving issue, the substituted gift would be void for remoteness, because the class of issue would not necessarily be determined within the limits laid down by the rules as to perpetuity.

As to the duration of the wife's interest the will was obscure and contradictory, but, upon the whole, His Honour thought that the testator in-

The eldest son and the widow appealed. Some of the children had attained the age of twenty-three years, but it did not appear that any of them had issue.

Mr. *Glasse*, Q.C., and Mr. *Brodrick*, for the Appellants, contended that this was an indivisible gift to a class, and was void for remoteness. One of the children might have died immediately before the death of the widow, leaving a child less than a year old, and in that case the vesting would be postponed for more than twenty-one years after the death of the widow. The rule was clearly laid down in *Cattlin* v. *Brown*. (1)

Mr. *Cotton*, Q.C., and Mr. *Nalder*, for the other parties to the suit, contended that the gift might be separated into two gifts: one to the children, which was good, the other to the issue of deceased children, which, no doubt, would be bad. There appeared to be in the decree as drawn up some error as to the life interest of the widow.

LORD HATHERLEY, L.C., said that the Court was always desirous to give effect to the wishes of a testator, but here the rule of law interfered, as the gift would carry the limitations beyond the period of a life or lives in being, and twenty-one years afterwards. The Vice-Chancellor seemed to have attempted to give effect to the bequest by giving the widow the life interest in the shares of the children only until they respectively attained the age of twenty-three years; but there were no words in the will which would give anything to the children at that time. She was to maintain them up to a certain age, but it was consistent with

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tended his wife to have the income of the £7000 and the rents of the real estate, but that all the rest was clothed with trusts for the children. If the testator intended the wife to take the income during her life why did he say "until his children should become respectively entitled," &c.? His Honour thought that the wife was only intended to get the income until the children respectively attained the age of twenty-three. As each child attained twenty-three the wife lost the income of a share.

Then who was to have the income during her life? It must either be accumulated or the children must have it, and upon the whole will His Honour thought that the children must take it themselves.

(1) 11 Hare, 372.

that direction that her life interest was to continue, and the question was, what shares they would take at her death. There was but one class, and the Court could not make two classes of them. It was impossible to ascertain within the proper period how many shares the fund would be divisible into, and the whole gift was involved in that uncertainty. The gift was therefore void.

SIR G. M. GIFFARD, L.J., said that the gift to the wife was for life. This construction was supported by the direction to convert after the death of the widow. Then in the gift of the residue there was but one class, and some of that class might not come into *esse* within the legal period. The only thing to be urged against that was the direction as to the share of the daughter *Margaret*, but that was quite consistent with the bequest to the class.

The ultimate gift was void for remoteness, and the widow was entitled to the whole income for life, subject to the charge of maintaining such of the children as had not attained the age of twenty-three years.

Solicitors for all parties: Messrs. *Hicks & Son.*

L. J. G.

1870

Feb. 14, 15.

In re BAGLAN HALL COLLIERY COMPANY.

Company—Contributory—Subscriber of Memorandum—Paid-up Shares—Payment in kind.

[illegible]
8 Ch 258,
— 272–78
— 772, 6.7
9 Ch 54
17 Eq 174, 8
18 Eq 105. 110
9 Ch 290
10 Ch D 84.
— 88, 90

Nine persons bought a moiety of a colliery from *P.* for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests; the nominal amount of shares subscribed for being £20,000. The memorandum stated nothing as to the shares being treated as paid-up shares, but the articles provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted:—

Held (reversing the decision of *Malins*, V.C.), that the subscribers of the memorandum of association were not liable as contributories, for that the shares must be taken as having been fully paid up by the handing over the colliery.

THIS case came before the Court on motion, by way of appeal from a decision of Vice-Chancellor *Malins* placing the names of the Appellants on the list of contributories of the *Baglan Hall Colliery Company, Limited.*

In and for some time previous to the year 1867 ten persons were carrying on in partnership the business of a colliery, known as "*The Baglan Hall Collieries.*" *J. G. Parker,* who was one of them, had been the owner of the colliery, which he purchased in 1865, and the other nine persons had paid him £10,000 for a moiety of it, which sum they contributed in different proportions. After carrying on the business for some time without much success, they in 1866 borrowed £3000, and then £1000 on mortgage of the colliery. Matters stood thus when the company was formed. It was deposed that at the time when the purchase was made, and subsequently when the above mortgages were made, the colliery was valued by surveyors as fully worth £20,000.

In May, 1867, the company was registered as a limited company. The memorandum of association stated the objects of the company to be "the working of the properties known as the *Baglan*

Hall Collieries, in the county of *Glamorgan*, and any other colliery or collieries in the same county or conveniently adjacent," [then followed an enumeration of acts incidental to the carrying on of collieries] "and the doing all such other acts and things as may be in any manner incidental or conducive to the attainment of the above objects." The nominal capital was stated to be £25,000, divided into 500 shares of £50 each. The memorandum as originally drawn stated that of these shares 300, numbered consecutively from 1 to 300, were called A. shares, and that those numbered consecutively from 301 to 500 were called B. shares, and that these 200 B. shares were allotted to *Parker* on the terms mentioned in the articles; but the whole of this statement was struck out in the memorandum as registered. The ten partners subscribed the memorandum for 400 shares in all, *Parker* for 200, and the others for numbers of shares corresponding to their interests in the concern. No other person subscribed the memorandum, and no other shares were ever taken. The original table of signatures to the memorandum described the 200 shares for which *Parker* signed as B. shares, and the others as A. shares; but this description was also struck out in the memorandum as registered. *Parker* was also originally entered as subscribing for twelve A. shares, as well as the 200 B. shares, but in the memorandum as altered he subscribed for 200 shares only.

The articles recited that the several persons whose names were subscribed to the memorandum of association were possessed, in the respective proportions of the numbers of shares set opposite to their respective names, of the colliery, which was vested in *Parker* as a trustee for them, subject to the mortgages for £3000 and £1000, and that the same persons were desirous of framing regulations for the management of the said collieries. The articles then proceeded, "It is agreed that the provisions of Table A. in the first schedule to the *Companies Act*, 1862, shall not apply to this company, but that the following shall be the articles of association of the company." The material part of the 2nd clause was as follows:—

"The nominal capital of the company shall be £25,000, divided into 500 shares of £50 each, but 400 only of such shares shall be allotted, until a resolution of the managing committee shall authorize the issue of the remainder thereof. . . . The said 500 shares shall be sub-divided into two classes, and 300 of such shares shall be called A. shares, and 200 of such shares shall be called B. shares, and the said 200 B. shares in addition to twelve A. shares shall be allotted as fully paid up shares to the said *J. G. Parker*, in respect of his interest in the said collieries and the property and effects thereof, upon the terms that the holder or holders of the B. shares shall not be entitled to participate in the profits in any year in which the net profits shall be insufficient to pay a dividend at the rate of 20 per cent. on such of the 300 A. shares as shall for the time being be subscribed for and allotted and fully paid up; but the whole of such profits, in case the same shall not in any year exceed 20 per cent. on the A. shares so subscribed for, allotted and paid up, shall be divided amongst the holders of the A. shares exclusively, and if such profits in any year shall be more than sufficient to pay a dividend of 20 per cent. on the A. shares for the time being subscribed for, allotted, and paid up, but shall not be sufficient to pay a dividend of 20 per cent. on both the said A. shares and the 200 B. shares, then the surplus profits of such year over and above the 20 per cent. on the said A. shares shall be applicable to and applied in payment of a dividend on the said B. shares *pro ratâ*. But if the profits in any year shall be sufficient to pay a dividend of 20 per cent. on both the said A. and B. shares, the whole of the A. and B. shares shall participate in the profits in such year *pari passu*."

19. "The whole of the 200 A. shares subscribed for in the memorandum of association and the whole of the 200 B. shares shall be deemed to be fully paid up, and every subscriber for the said 400 shares shall be credited in the books of the company with the full amount payable in respect of his shares; and every shareholder who may have advanced any moneys for the purposes of the collieries previously to the registration of the company shall be credited with the amount of his advances with interest after the rate of 5 per cent. per annum, from the date of each advance in the books of the company."

On 1st of June, 1867, *Parker*, in whom the legal estate in the colliery was vested, executed a declaration of trust in favour of the company.

Before the registration of the company a negotiation had been going on with a Mr. *Ashwell*, for a loan of £7000, on mortgage. This was continued after the registration, and the colliery was mortgaged to *Ashwell* for £7000, *Parker* joining, and covenanting for payment, and the old mortgages being paid off out of the £7000, thus leaving £3000 applicable to working the colliery, which sum *Parker*, in his evidence, stated to have been misapplied.

The colliery was afterwards sold by the mortgagee, under his power of sale, for £4500.

An order having been made for continuing under the supervision of the Court a voluntary winding-up of the company, the shareholders other than *Parker* resisted being placed on the list of contributories, and the question having been adjourned into Court, Vice-Chancellor *Malins* decided that they must all be upon the list as holders of the numbers of shares for which they had subscribed the memorandum, treating such shares as shares on which nothing had been paid (1).

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(1) 1870. Jan. 17. W.N. ('70) 15

SIR R. MALINS, V.C.:—

I have no doubt as to the conclusion at which I ought to arrive in this extraordinary case, for the reasons I will proceed to state.

The case presented to me is this: A body of gentlemen are induced to join in working a colliery by Mr. *Parker*, who is the owner of one moiety. The owners of the other moiety became liable to pay, in respect of their moiety, sums amounting altogether to £10,000. They came to the conclusion that there was no way by which they could escape unlimited liability, except by registering under the *Companies Act*, and accordingly, on the 14th of May, 1867, the company was registered as a limited company.

The memorandum of association states the objects for which the company is established to be—the working (not, be it observed, the purchase, but the "working,") of the properties known as the *Baglan Hall Collieries*, in the county of *Glamorgan*, and any other colliery or collieries in the same county or conveniently adjacent. It further states the liability of the members to be limited, and the capital of the company to be £25,000, divided into 500 shares of £50 each. The persons subscribing the memorandum subscribe it for 400 shares in all, *Parker* being put down for 200, the rest being subscribed for by the nine persons against whom the present application is made. Their intention in doing this was to go on with the expensive and perilous operation of working a colliery without being liable, whatever the extent or effect of their trading might be, to be called upon by any labourer, by any tradesman who supplied them with goods, by any person who lent them money, or by any person whatever, to pay a single farthing. They were to have the chance of making the large profits which they expected out of a concern which had up to that time been unsuccessful,

L. J. G.
1870
In re
BAGLAN HALL
COLLIERY CO.

The shareholders, other than *Parker*, appealed.

Mr. *Cotton*, Q.C. and Mr. *B. B. Rogers* for some of the Appellants, relied on *Drummond's Case* (1), and *Pell's Case* (2). They

without incurring further liability to pay anything. If the laws of the country sanction such a proceeding they are in a most lamentable state. The *Companies Act*, 1862, has, indeed, left the liability of persons forming these companies far behind what it ought to be; but it appears to me from the 23rd section of the Act to have been clearly the intention of the Legislature that those who associate themselves and form a company must, by the memorandum of association, become members of the company in such a manner as to throw upon themselves some liability. I take it that the memorandum of association may be signed in respect of paid-up shares, as well as in respect of shares not paid up; but I think it perfectly clear that where it is signed in respect of paid-up shares it must also be signed in respect of at least seven shares which are not paid up; and if it cannot be found upon the face of the memorandum of association that any shares are signed for which are not paid up, that, in my opinion, vitiates the whole transaction as regards the protection of the shares, and renders every share liable to be called upon for the nominal amount for which it is issued. In the present case there is nothing upon the memorandum to lead any person looking at it to look into the articles of association; but any person looking at this memorandum is in my opinion entitled to assume that the shares were taken subject to the ordinary liability to pay up the nominal amount in full.

But it has been contended that whoever looked at the memorandum was bound to go on to the articles of association. I confess I have very great doubt about that, and where the shares are described in the memorandum of association in the ordinary manner, as if they were liable to calls to the full amount, I must hold that a person dealing with the company is not bound to look at the articles of association, but is entitled to assume the liability of those who sign the memorandum of association to be that which it appears upon the face of the document to be—a liability of the nominal amount of the shares. If, indeed, the shares had been described as A. and B. shares in the memorandum, then I think that would have thrown upon the person looking at the memorandum the obligation to look at the articles of association to see what the liabilities or privileges of these different classes of shares were; but in the absence of that I think there is no such obligation.

But assuming him bound to look at the articles, when he comes to clause 2 he finds that the shares are divided into 300, called A. shares, and 200 called B. shares. And what is the difference between them? Only this: that as between Mr. *Parker*, who holds the 200 shares, and the other shareholders, he is not a participator in any dividend till the holders of the A. shares have had 20 per cent. profit. When they have had 20 per cent., then *Parker* is to participate with them, and also referred to *Forbes and Judd's Case* (1); *Migotti's Case* (2); *Baron de Beville's Case* (3); *Leifchild's Case* (4); *Snell's Case* (5); *In re Anglesea Colliery Company* (6).

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(1) Law Rep. 4 Ch. 772.

(2) Law Rep. 5 Ch. 11.

not before. But how is a person, looking at the memorandum and articles, to know which are A. and which are B. shares? He may spell it out by this, that the B. shares are stated to be held by Mr. *Parker*, and he may infer, that as Mr. *Parker* holds 200 shares, those are the B. shares, and that all which he does not hold are A. shares. The second clause, therefore, does not affect the case.

Then they rely upon the 19th clause. The whole of the 200 A. shares subscribed for in the memorandum of association, and the whole of the 200 B. shares, shall be deemed to be fully paid up. Where are the 200 A. shares? I cannot find them, there is not a word about them. Persons intending to deal with the company, who look at the memorandum and articles, are not to be bound to a minute investigation; they are not to be obliged to go to consult solicitors and counsel as to what is the proper interpretation of the articles. It was intended in the memorandum of association to give certain privileges to the A. and B. shares; was it not the duty of the promoters in the memorandum of association to describe which shares belonged to one class, and which to the other? or, at all events, were they not bound to inform the public whether there were two such classes or not? A person reading these articles is not informed which are A. and B. shares; he can only spell it out in the way I have just suggested. If the shares had been described in the memorandum of association as A. shares and B. shares, no doubt this 19th clause would have shewn that these shares, A. and B., were to be deemed fully paid-up shares, and the persons dealing with the company would have notice of that fact. But there would have remained the question, whether it was competent to any persons to form a company upon the basis of fully paid-up shares only; for if not, the consequence would be, that the provisions of the 19th clause would be absolutely void; and, in my opinion, they were so void.

The general law upon the subject is settled, namely, that every person is liable for the number of shares for which he subscribes the memorandum of association. This was settled by *Evans' Case* (Law Rep. 2 Ch. 427); and *Migotti's Case* (Law Rep. 4 Eq. 238.)

Baron de Beville's Case (Law Rep. 7 Eq. 11) was this: the Baron subscribed a memorandum of association of a company for 450 ordinary shares and 138 paid-up shares. Now, subscribing the memorandum in these terms could not deceive anybody, because, on looking at the memorandum alone, it could be seen at once that he was liable for 450 shares to the full nominal amount, and that upon 138 shares he was not liable, because the very basis of the contract was that they were to be treated as paid in full. But the Master of the Rolls expressed a clear opinion, that if he had subscribed for the 138

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(1) Law Rep. 5 Ch. 270.
(2) Ibid. 4 Eq. 238.
(3) Ibid. 7 Eq. 11.
(4) Law Rep. 1 Eq. 231. 11 Jur NS 941
(5) Ibid. 5 Ch. 22.
(6) Ibid. 2 Eq. 379; 1 Ch. 555.
12 Jur NS 498, 596

Mr. *Everitt* for other Appellants.

Mr. *Glasse*, Q.C., and Mr. *Caldecott*, for the official liquidator:—*Pell's Case* turns on the ground that there was an unimpeached agreement for sale to the company, and on this all the decisions of

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paid-up shares only, he would have been liable, for that a man cannot subscribe for paid-up shares only. He says: "A person cannot sign the memorandum of association for shares generally, and afterwards say that some or all of them are paid-up shares, unless money or money's worth was actually paid by him or on his behalf for those particular shares; and also, if he sign the memorandum of association in respect of shares there stated to be paid-up shares, while they are not really paid up, he will, in my opinion, be liable to pay the amount due on the shares. The Court cannot make the distinction between one set of shares and another which does not appear on the memorandum of association, and he is therefore liable for all." I asked the learned counsel who have addressed me for the Respondents in this case, whether any Appellate Judges had ever expressed any dissent from the rule laid down by the Master of the Rolls in this case. I was not informed that they had; on the contrary, the learned counsel told me that they thought the decision in that case perfectly right. Then what is the rule? The Court cannot make the distinction between one set of shares and another which does not appear upon the memorandum of association, and the person subscribing is therefore liable for all. Here nothing appears on the face of the memorandum of association but that these gentlemen were liable for the number of shares written opposite their names. The views I entertain on this subject are completely those which were expressed by the Master of the Rolls, which appear to me to be founded on the soundest principles of law, common sense, and honesty. I say "honesty," for I do not think it becoming for men to contend that they are at liberty, by any device, to embark in commerce so as to take the chance of gaining their ends and getting what profit they can, but, if they are losers, not to be liable for a single farthing.

But these gentlemen say, "We have paid up our shares, we contributed a colliery, and by contributing a colliery we paid up our shares." What is the law on this subject? No doubt it is settled by *Drummond's Case* (Law Rep. 4 Ch. 772), *Pell's Case* (Law Rep. 5 Ch. 11), and many other cases, that a man who agrees to take shares is not bound to pay for them in money; he may pay for them in money's worth; but I apprehend it is equally clear that the delivery of goods or money's worth, which is to relieve from the payment of money, must be something given to the company in lieu of the money after it is formed, and that that which is given to the company before its formation will not do.

Now, in *Pell's Case* and in *Drummond's Case* the original liability to take and pay for shares was not disputed. But how was that liability got rid of? In *Drummond's Case* by the delivery to the company of something which the Lord Justice *Giffard* thought equivalent to money, after the formation of the company; so in *Pell's Case*, by the delivery to the company, after its formation, of something equivalent to that class rest. Here we say there was no agreement, for how are a body of persons to contract with themselves? The claim to freedom from liability rests on this: that the handing over of the colliery was a payment of £20,000; but, there being no effective contract, the sound view is that the colliery is to be taken only at its real value, according to the decision of the Master of the Rolls in *Pell's Case*. The formation of this company was a mere device for escaping the liability to pay just debts, and it comes within the observations of the Lord Chancellor in *Forbes and Judd's Case* (1). A company where all the partners take paid-up shares, and nothing else, is not within the spirit of the Act. In *Leifchild's Case* (2)

money. But in *Forbes and Judd's Case* (Law Rep. 5 Ch. 270), the Master of the Rolls does not seem to acquiesce in this view of the Lord Justice *Giffard*. I am disposed to agree with 121 the Master of the Rolls; but of course I take the law from the Judge of Appeal. Happily, however, I do not think either *Drummond's Case*, *Pell's Case*, or *Forbes and Judd's Case* has any application to the present, because in all those cases, as I have already said, the question arose, not upon payment of money, but upon the delivery of that which was money's worth after the formation of the company; while in this case it is not pretended that from the day of the registration of the memorandum of association there was delivered to this company anything worth a single farthing by any one of these gentlemen. They resist their liability on the sole ground that they registered their company in respect of paid-up shares only. But even if it had been stated on the face of the memorandum of association that the shares were all paid-up shares, that, in my opinion, in accordance with the view expressed by the Master of the Rolls in *De Beville's Case*, would have rendered the registration absolutely void, and they would still have been liable for the full amount of the shares. The memorandum, however, having been subscribed in the general form, I am clearly of opinion that they must all be put upon the list as contributories for the whole amount of their shares. *Leifchild's Case* (Law Rep. 1 Eq. 231) 11 Jur. N S 941) was an early case, the point was not raised in it, and, indeed, could not have been raised, for *Leifchild* was not a subscriber of the memorandum.

Upon the general question I have only this remark to make: if I were to accede to the arguments of the Respondents in this case, the result would be, that persons who had been carrying on a colliery unsuccessfully might then, by registering it with paid-up shares, carry on that colliery from that day forward, employing working men, and when the workmen ask for their wages, turn round and say, "We are a limited company, we registered in respect of fully paid-up shares; that is notice to you, and you must look to the colliery, and the colliery only;" and these poor men might go to the colliery to get it, and how are they to get it for their weekly wages? Such principles will meet with no sanction from me; and I decide that the respondents must be put on the list of contributories.

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(1) Law Rep. 5 Ch. 270.

(2) Law Rep. 1 Eq. 231. 11 Jur. N S 941

L. J. G.
1870
In re
BAGLAN HALL
COLLIERY CO.

the point was not raised. If the register is not made up according to the requirements of section 25, creditors are entitled to treat the shares as not paid up. *Barge's Case* (1). Now here no register could be correct, but a mere copy of the memorandum.

Mr. *Cottrell,* for *Parker,* and *Ashwell* the mortgagee, supported the decision of the Vice-Chancellor, and referred to *Feiling and Rimington's Case* (2); *Sewell's Case* (3); *Droitwich Patent Salt Company* v. *Curzon* (4).

Mr. *Cotton,* in reply.

SIR G. M. GIFFARD, L.J.:—

18 Eq 100

There appears to be some confusion in the views entertained of cases of this nature, and it will be well in the first place to consider what are the rules applicable to the subject. The only sections of the *Companies Act* that need be referred to are the 7th, 11th, 12th, 23rd, and 25th. The 7th provides for the limitation of liability, the 11th provides for the memorandum of association, and the 23rd provides that those who subscribe the memorandum are to be deemed to have become members of the company. Taking these sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it—to take them, and to pay a proper consideration for them. The 12th section provides that the memorandum of association can only be altered in certain particulars and in a particular way; if, therefore, the memorandum and the articles are inconsistent the articles must give way; but there is not any inconsistency between a memorandum which is general in its terms, and articles which state that the payment for the shares is to be made in a particular way according to the terms of a contract referred to in the articles; nor do I see that payment in kind according to a subsequent contract with the company is inconsistent with such a memorandum. If there be a contract of such a nature that on bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal. The 25th section imposes on

8 Ch. 77

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(1) Law Rep. 5 Eq. 420.
(2) Ibid. 2 Ch. 714.
(3) Law Rep. 3 Ch. 131.
(4) Ibid. 3 Ex. 35.

the company the duty of keeping a register of its members, shewing to what extent the shares are paid-up.

Several of the cases on the subject were reviewed by me in *Drummond's Case* (1), and may be rapidly run over. In *Evans' Case* (2) the decision simply was, that a man by signing a memorandum of association contracts to become a shareholder, and if he takes no shares he will be held liable in respect of that contract if there are shares in existence which can be attributable to him. There can be no mistake about what was decided in *Migotti's Case* (3), which is a case quite distinct from *Evans's Case*. It was decided that *Migotti*, by signing a memorandum of association contracted with the company to take five shares, and that taking five paid-up shares which belonged to *Carter*, not to the company, was taking shares from *Carter*, and not from the company, and that therefore he had never fulfilled the contract with the company which he had entered into by signing the memorandum of association. In *Baron de Beville's Case* (4) the Master of the Rolls said: "A person cannot sign the memorandum of association for shares generally, and afterwards say that some or all of them are paid-up shares, unless money or money's worth was actually paid by him or on his behalf for those particular shares; and also, if he sign the memorandum of association in respect of shares there stated to be paid-up shares, while they are not really paid-up, he will in my opinion be liable to pay the amount due on the shares." That is, if a man contracts to take shares he must pay, either in money or money's worth, and payment in either will be a satisfaction. Then in *Pell's Case* (5), the Master of the Rolls allowed the agreement between *Pell* and the company that he should hand over property to the company, and that his shares should be taken as fully paid-up shares, to stand so far as the value of the property went, but directed an inquiry as to its value. This was varied on appeal, and the agreement not being impeached, it was held that the shares must be taken as fully paid-up by the handing over the property. In *Forbes and Judd's Case* (6) the Master of the Rolls thought that *Migotti's Case* and *Drummond's Case*

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(1) Law Rep. 4 Ch. 772.

(2) Ibid. 2 Ch. 427.

(3) Ibid. 4 Eq. 238.

(4) Law Rep. 7 Eq. 11, 14.

(5) Ibid. 8 Eq. 222.

(6) Ibid. 5 Ch. 270.

L. J. G.
1870
In re
BAGLAN HALL COLLIERY CO.

were in conflict, but the distinction between them appears to me to be broad and plain. He further suggested that if the arrangement by which the company incurred the obligation to purchase certain property from the shareholders was antecedent to the formation of the company, the transaction was forbidden by the Act, and the obligations of the shareholders could not be satisfied by it. When that case came before the Court of Appeal the Lord Chancellor was clearly of opinion that if the obligation on the part of the company was a valid and subsisting obligation when the shares were to be paid for, the time when it was contracted was of no importance. That case may be taken as settling the law on the subject, and we only have to apply the law to the facts.

Here was a colliery in which at first *Parker* alone was interested. He sold a moiety to certain gentlemen for £10,000, which was paid. The colliery was then subject to two mortgages for £3000 and £1000. The owners went on working the colliery, not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability. It was the policy of the *Companies Act* to enable this to be done, and with the soundness of that policy we have nothing to do. The memorandum of association was signed by *Parker* for 200 shares, and by all the other part owners for shares, the nominal amounts of which were equal to the sums they had respectively paid to *Parker* for their interests in the colliery. The memorandum states the object of the company to be the working this colliery and any other collieries in the same county, or conveniently adjacent, and the doing all such other acts as may be incidental or conducive to the attainment of any of the above objects. It was urged that purchasing the colliery was not one of the objects; but the company could not work the colliery without first acquiring some interest in it, and I think, therefore, that the purchase of it was an act "conducive" to the attainment of the primary object. Then, when we come to the articles, the distinction between A. and B. shares in the second clause occasions no difficulty, though nothing is said about them in the memorandum; it is merely provided that one class is to be postponed to the other in the division of profits. Then any person intending to deal with the company, and looking at the articles, would see, from the 19th article, that all the 400 shares subscribed for were fully paid-up shares, and would find from the register that the additional 100 shares were never issued; and he also would find from the articles that the allottees of the 400 shares must hand over the colliery to the company as the consideration for their shares. According to the decided cases, this, in the absence of fraud, was an effectual paying up of the shares in full. The test to be applied is this: could the company by any proceeding have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interests in the colliery? and I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with. There is nothing in the evidence to shew that any person has been deceived. It appears probable that if the additional £3000 which was raised by the last mortgage had been applied in working the colliery the concern would have prospered. The case is precisely the same as *Pell's Case* (1), and it must be held that the persons who subscribed the memorandum of association have paid all that they were bound to pay. Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual make inquiry into the state of his circumstances; and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. In this case there was no concealment, and it would, in my judgment, be a total misapplication of the Act, to say that a transaction like the present is not authorised by it. If strangers, no misrepresentation being made, choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability. Persons, however, who enter into a transaction of this nature must expect to have it strictly examined, and, under all the circumstances, the Appellants must bear their own costs, both below and here.

Solicitors: Mr. *Becke;* Mr. *W. M. Wilkinson;* Messrs. *Valpy, & Chaplin;* Mr. *D. A. Rivolta;* Messrs. *Nokes, Carlisle & Francis.*

(1) Law Rep. 5 Ch. 11.

L. J. G.
1870
Jan. 29;
Feb. 8, 18.

In re EUROPEAN BANK.
Ex parte ORIENTAL COMMERCIAL BANK.

Notice—Overdue Bill of Exchange—Fraud—Equities attaching to Bill of Exchange.

11 Eq 483
7 Ch 166
20 Eq 249
15 Ch D 641
642

P., the manager of the *O.* bank, abstracted moneys of the bank, and bought with them, on the 21st of March, 1867, certain overdue bills of exchange. On the 4th of April, 1867, the *E.* company, promoted by *P.*, was registered, of which, till July in that year, *P.* was the sole director. On the 6th of April, 1867, *P.* sold these bills to the *E.* company, and paid himself for them out of their funds. The *E.* company were still the holders. The bills having been proved against the company on which they were drawn:—

Held, that the *E.* company were not affected with notice of the title of the *O.* bank through the knowledge of *P.*, as *P.* could not be taken to have disclosed to the *E.* company his own fraud:

But *held*, that the claim of the *O.* bank to the bills, as having been purchased with their money, was an equity attaching to the bills; that the *E.* company, having purchased them when overdue, took subject to this equity; and that the *O.* bank were entitled to the benefit of the proof.

THIS was an appeal from an order of the Vice-Chancellor *Malins* dismissing a summons taken out by the *Oriental Commercial Bank* with reference to certain bills drawn on and accepted by the *European Bank*, which was now in course of winding up, but able to pay its debts in full. The *Eastern Commercial Bank* were the holders of the bills, but the *Oriental Commercial Bank* claimed the proceeds on the ground that the bills were bought with their moneys by one *Demetrio Pappa;* that the *Eastern Commercial Bank* had notice of this through *Demetrio Pappa;* and that, whether they had notice or not, they could stand in no better position than *Demetrio Pappa* would have stood if he had not parted with the bills, because they were overdue when he transferred them.

The bills in question were bought by *Demetrio Pappa* on the 21st of March, 1867, for 15*s.* 4*d.* in the pound. They were at that time overdue. *Demetrio Pappa* had an account with the *National Bank of Scotland* in the name of *George John Pappa*, a relation of his, which account, in his affidavits, he alleged to be his own. On

L. J. G.
1870
In re EUROPEAN BANK.
Ex parte ORIENTAL COMMERCIAL BANK.

the 19th of March, 1867, a sum of £2594 6*s.* 1*d.* was paid into this account, and on the 21st of March a sum of £2300 was drawn out and applied in the purchase of the bills in question, along with bills of the *Oriental Commercial Bank* for £2000.

In 1866, after a Petition, upon which an order for winding up the *Oriental Commercial Bank* was afterwards made, had been presented, *D. Pappa*, who was the manager of the bank, sent out *G. J. Pappa* to *Patras*, as he alleged, on his private business, but, as he admitted, with instructions also to receive the debts due to the bank and to settle its debts. He denied that the bills of the *European Bank* were purchased with moneys of the *Oriental Commercial Bank* collected abroad by *G. J. Pappa*, and the Vice-Chancellor, upon the evidence before him, considered that, although there was great reason to suspect that *D. Pappa* had made the purchase with assets of the *Oriental Commercial Bank*, it was not proved with sufficient distinctness that he had done so, and that the case of the applicants therefore failed.

On the appeal motion the *Oriental Commercial Bank* adduced fresh evidence which proved most indisputably that the £2594 6*s.* 1*d.* paid into the account of *G. J. Pappa* on the 20th of March, 1867, was made up of two sums of £2094 6*s.* 1*d.* and £500, and that the larger of these two sums arose from assets of the *Oriental Commercial Bank* which *G. J. Pappa* had collected abroad, and had handed over to *D. Pappa* on his return.

The *Eastern Commercial Bank* was a limited company, of which *Demetrio Pappa* was the promoter. It was registered on the 4th of April, 1867, under a memorandum of association dated the 2nd of April, and articles dated the 4th of April, in that year. *Pappa* was the managing director, and until July, 1867, he was the only director. He sold the bills in question to the *Eastern Commercial Bank* on the 6th of April, 1867, at 16*s.* in the pound, and paid himself for them by a cheque which he, as managing director, drew on the funds of that company.

Mr. *Jackson*, and Mr. *W. W. Karslake*, for the *Oriental Commercial Bank*, in support of the appeal motion:—

The money with which these bills were purchased is proved to have been our money, and *D. Pappa* could not hold them as

L. J. G.
1870
In re EUROPEAN BANK.
Ex parte ORIENTAL COMMERCIAL BANK.

against us. The *Eastern Commercial Bank* can be in no better position than he, for he was the sole managing director; he, in fact, was the bank; he had the sole management of it, and the bank must be held to have notice of all he knew. If notice to a person in his position is not notice to the company which he manages, any amount of fraud may be perpetrated. The doctrine of *Colyer* v. *Finch* (1), *Kennedy* v. *Green* (2), and *Hewitt* v. *Loosemore* (3), cannot apply against us, as we do not claim under *Pappa*, but by a title paramount. *In re Carew's Estate Act* (4) is for us on the point of notice, and *In re Peruvian Railways Company* (5) does not conflict with it. We have a title even at law: *Lee* v. *Zagury* (6). But if the Court is against us as to notice, still the circumstance that the bills were overdue when bought is equivalent to notice: *Esdaile* v. *La Nauze* (7); *Holmes* v. *Kidd* (8); *Collenridge* v. *Farquharson* (9); *Ex parte Swan* (10).

Mr. *Pearson*, Q.C., and Mr. *Locock Webb*, for the *Eastern Commercial Bank*, were desired by the Court to confine themselves to the question as to the bills being overdue when they were purchased:—

No doubt the indorsee of an overdue bill takes it subject to its equities, but they must be equities attaching to the bill, equities between the holder and the drawer or acceptor. No other equity is recognised. This is the result of the cases which are collected in *Ex parte Swan;* and *Charles* v. *Marsden* (11) contains strong dicta shewing that the equity goes no further.

The LORD JUSTICE GIFFARD:—Why is not an equity between the indorser and a third party to be enforced?

The law, we submit, is, that it is not to be enforced, nor is it expedient that it should.

Mr. *W. W. Karslake*, in reply.

(1) 5 H. L. C. 905. 3 Jur NS 25
(2) 3 My. & K. 699.
(3) 9 Hare, 449.
(4) 31 Beav. 39.
(5) Law Rep. 2 Ch. 617.
(6) 8 Taunt. 114.
(7) 1 Y. & C. Ex. 394.
(8) 3 H. & N. 891.
(9) 1 Stark. 259.
(10) Law Rep. 6 Eq. 344.
(11) 1 Taunt. 224.

L. J. G.
1870
In re EUROPEAN BANK.
Ex parte ORIENTAL COMMERCIAL BANK.

Feb. 18. SIR G. M. GIFFARD, L.J., after stating the facts and reviewing the evidence, continued:—

I have read the evidence at some length in consequence of the nature of the charge, and I do not hesitate to say that it is proved to demonstration that the £2094 6*s.* 1*d.* was the amount arising from the discount of bills belonging to the *Oriental Commercial Bank*, and that this, with a sum of £500, forms the sum which appears in the trust account under date of the 19th of March as a sum of £2594 6*s.* 1*d.*, and that the sum of £2300 under date the 21st of March, on the other side of the account, was drawn out and applied in the purchase of the bills from *Melas, Brothers*, of which the bills in question, amounting in all to £1000, formed part, the rest being bills for £2000 on the *Oriental Commercial Bank.* To speak plainly, and in such a case there ought to be plain speaking, *Demetrio Pappa* has sworn that which is not true, and has applied to his own purposes the moneys arising from the discount of bills, which bills, he knew, belonged to the *Oriental Commercial Bank.* A grosser fraud there cannot be. Now at all events the facts have been proved, and it remains to be seen what the law is as applicable to these facts. The bills and moneys belonging to the *Oriental Commercial Bank* were not received either by *George John Pappa* or *Demetrio* until after the presentation of the Petition for winding up that bank; therefore no question of account as between the bank and *Demetrio Pappa* arises. The £237 paid over by *John George Pappa* to the liquidator has nothing to do with this matter; it is in no way concluded by any receipt given by or settlement of accounts with the official liquidator: and if the bills in question were now in the hands of *Demetrio Pappa*, beyond all question the *Oriental Commercial Bank* could follow their moneys into them, and assert a right to a proportional part of the proceeds. Is then the *Eastern Commercial Bank* in any better position than *Demetrio Pappa* would have been? In my opinion they were not affected with notice through *Demetrio Pappa*. He purchased the bills before the *Eastern Commercial Bank* was formed. He stood in the relation of vendor to that bank, and though he was managing director and something more, and paid himself by cheque, he is not in the position of a partner in an ordinary firm, but of agent

L. J. G.
1870
In re
EUROPEAN BANK.
Ex parte
ORIENTAL COMMERCIAL BANK.

11 Eq 483.

acting for the bank as principal. He cannot be taken to have disclosed his own fraud: *Kennedy* v. *Green* (1) therefore applies.

But the want of notice is not conclusive on the case. The bills were overdue when the *Eastern Commercial Bank* took them, there were equities affecting the bills, and the *Eastern Commercial Bank* has no better title, either legal or equitable, than *Demetrio Pappa* had. The law on this subject cannot be better stated than is done by Vice-Chancellor *Malins* in his judgment in *Ex parte Swan* (2).

In this case there is an equity attaching directly to the bills. The result therefore is that the *Oriental Commercial Bank* can follow their moneys into the bills in the possession of the *Eastern Commercial Bank*, precisely in the same way as though *Demetrio Pappa* had not parted with them. I have not calculated the exact amount which was applied in payment of these bills, but as the amount applied in payment of them and the other bills was £2300, and the £2300 was drawn against a sum of £2594 6*s.* 1*d.*, which was made up of a sum of £2094 6*s.* 1*d.* belonging to the *Oriental Commercial Bank* and of £500 belonging to *Demetrio Pappa*, and it must be taken according to the case of *Pennell* v. *Deffell* (3), that these two sums contributed rateably, it will follow that the *Oriental Commercial Bank* is entitled to so much of the proceeds of the bills as is represented by their proportion of the purchase-money, and the *Eastern Commercial Bank* to so much as is represented by the £500; the proportion will be somewhere about four-fifths and a fraction, and a fraction less than one-fifth. There will be a declaration to this effect and payment accordingly. The amounts can be calculated. As regards costs, the *European Bank* are in the position of Plaintiffs in an interpleader suit, and must have them both here and below out of the fund. The other parties must bear their own costs. The *Oriental Commercial Bank* have failed in part, that is as regards the £500, and they completed their case by evidence which was not before the Vice-Chancellor. The practice of the Court admits of the introduction of new evidence on an appeal motion; but where there is an incomplete case in the Court below, and a complete one only on the appeal, I shall as a general rule adopt the course of refusing to give any costs.

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(1) 3 My. & K. 699.

(2) Law Rep. 6 Eq. 359, 360.

(3) 4 D. M. & G. 372. 18 Jur 273.

The order of the Vice-Chancellor will be discharged and the order I have suggested substituted for it. If the additional evidence had been before him I gather from his judgment that his order would have been the same as that which I now make.

Solicitors: Messrs. *Upton & Co.*; Messrs. *Taylor & Jaquet.*

L. J. G.
1870
In re
EUROPEAN BANK.
Ex parte
ORIENTAL COMMERCIAL BANK.

In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

L. J. G.
1870
Feb. 19, 26.

Company for Foreign Business registered in England—Winding-up Order—Shares transferable by delivery.

18 Eq 34
6 Ch Cas 3

If it appears from the memorandum and articles of association of a company that some kind of management and business in *England* is contemplated, the company comes within the provisions of the *Companies Act*, 1862, and may be properly registered under that Act, although all the subscribers to the memorandum and all the directors are foreigners residing abroad.

But if, after it has been registered, such a company does not carry on business in this country, proceedings may be taken to have it wound up; and the Court has jurisdiction to make a winding-up order, although all its shareholders are foreigners and it has never transacted any business in *England.*

The articles of association of a limited company, registered under the *Companies Act* of 1862, conferred a power on the directors to issue certificates of shares transferable by delivery. *Quære*, whether this provision was legal. But *held*, that if it was not legal it would not render the company illegal nor preclude it from being wound up under the order of the Court.

The decision of *Malins*, V.C., reversed.

Affd 5 HL 170

IN this case there were two appeals from orders of Vice-Chancellor *Malins,* dismissing two petitions for the winding-up of the *General Company for the Promotion of Land Credit, Limited.*

The company was registered under the *Companies Act*, 1862, on the 24th of June, 1865, with a registered office in *Westminster*, and a nominal capital of £5,000,000, in 500,000 shares of £10 each.

The objects of the company, as stated in the memorandum of association, were as follows:—

A. To procure the capital for any company in any country, but particularly in the States of the *German Confederation*, formed for the purpose of carrying into effect any object based on land, such as companies formed for the purposes of agriculture, land credit, mortgages, and guarantees for real estate, and to issue the capital of such companies, and to subscribe for, purchase, and dispose of the shares, bonds, and securities of these companies, or any other securities on real estate, mortgage securities, bonds secured on real estate, or *lettres de gage*, to make loans on such shares, bonds, and securities, and to sell, buy, exchange, and otherwise deal with and utilize the same.

B. To receive moneys on deposit, account current, or otherwise, with or without allowance of interest, and to receive on deposit title deeds and other securities.

C. To enter into treaty, act or unite with, assist, amalgamate, buy up, or absorb any other company, either English or foreign, having for its object land or real estate.

D. To act as managers or direct the management of state domains, of the property and estates of communes, corporations, foundations, or private persons, either in the capacity of stewards or receivers, or in that of lessees or tenants, with power of advancing at a discount all or any of the accruing rents, royalties, or incomings, to advance money on or purchase any such estates or properties, and to make resales thereof in every country where such resale is legally permitted.

E. To transact on commission the general business of a land agent, or the business of an establishment for the purchase, sale, and guarantee for third parties of every sort of freehold property or freehold rights or interests.

F. To do all other things whatsoever which the company shall think directly or indirectly incidental or conducive to any of the aforesaid objects, or likely to be advantageous to the company in connection therewith.

The memorandum of association was subscribed by seven foreigners, all described as residing at *Brussels*.

The articles of association provided, among other things, that the expression "nominative shares" should mean shares upon which scrip certificates, as provided by clause 14, should not have been delivered (Art. 1). That any person having signed the memoran-

L. J. G.
1870
In re
GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

dum of association or an application for shares in such form as the directors might determine, should be deemed to have accepted the shares allotted to him (Art. 6). That the directors might issue to every holder of any share on which one-half of the nominal amount had been paid up, a scrip certificate to bearer in respect of such shares, certifying that the holder of such certificate was the owner of the shares and that 50 per cent. of the amount of such share had been paid (Art. 14). That the company might commence to carry on business when shares to the amount of £2,000,000 had been subscribed and the deposits paid (Art. 16). That every share in respect of which a scrip certificate in conformity with Article 14 had been issued might be transferred by mere delivery of such certificate (Art. 21). That no person should be registered as a transferee of a share of which no scrip certificate had been issued thereon called "nominative shares," without the sanction of the board of directors (Art. 23). That every instrument of transfer of a nominative share should be presented to the company accompanied by the certificate of the share to be transferred, and such evidence as they might require to prove the title of the transferee; and that upon such certificate and evidence being produced the company should register the transferee as a member (Art. 24). That the first general meeting should be held at a time and place, on the continent of *Europe* or at *London*, to be appointed by the directors, that all other ordinary general meetings should be held once a year at such time and place as might be appointed by the directors (Art. 39). That extraordinary general meetings should be held at the registered office upon the requisition of shareholders holding shares to the amount of £500,000, to be left at the registered office (Arts. 41, 42). That notices of meetings and of dividends, and all other notices required to be given by the company to its shareholders, should be given by advertisements in the *London Gazette* and in one of the newspapers of *Paris*, *Brussels*, *Vienna*, *Munich*, and *Amsterdam*, to be selected by the directors (Art. 43). That local meetings might be held at *Paris*, *Brussels*, *Amsterdam*, or any other city or town which the company or the directors might deem convenient (Art. 52). That the affairs of the company should be managed by a director delegate, assisted by a committee of management (Art. 67). That for the

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

first seven years M. *Langrand Dumonceau,* of *Brussels,* should be the director delegate (Art. 72). That seven persons therein named (all of whom were foreigners, and one only resided in *England*), should be the first directors (Art. 76). That notices of dividends should be inserted in the *London Gazette* (Art. 128). That the books of account should be kept in such country and at such place as the directors should appoint, and duplicates of these books, or such extracts or copies from them as the *Companies Act,* 1862, should require, should be kept at the registered office (Art. 132); and that the annual balance sheets and reports should be published in one or more of the newspapers most in circulation in the different countries where the company should have transactions (Art. 135). That in any country where the law should permit the company might appear and defend by the chairman of the board or by a director specially delegated for the said purpose (Art. 149); and that the company might from time to time, under their common seal, agree to refer to arbitration, in accordance with the *Railway Companies Arbitration Act,* 1859, any differences between itself and any other company or person (Art. 150).

No meetings of the company or its directors were ever held in *England.* All its registered shareholders were foreigners, living out of *England,* but it had an agent at the registered office, who made the returns of shareholders to the Registrar of Joint Stock Companies. By the return for 1868 it appeared that there were only six registered shareholders, holding in the aggregate 120,260 shares, 179,740 shares being entered as "shares to bearer."

One Petition was presented by the *International Land Credit Company, Limited,* an English company, who claimed to be creditors of the company for £457,000, and were also stated to be the real owners of 100,000 shares in the company, of which one of their officers residing in *Brussels* was the registered holder. The *International Company* had their registered office at the same house as that of the *General Company,* and their secretary was the agent in *London* of the *General Company.*

The second Petition was presented by Messrs. *Bos* and *Dubourcq,* two of the directors of the *Banque Hypothecaire Neerlandaise,* at

L. J. G.
1870
In re
GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

Amsterdam, on behalf of the bank, who were creditors of the company for about £10,000.

The property of the company was stated to consist of shares in various foreign companies, and an estate in *Hungary* mortgaged to the *International Land Credit Company*.

The Petitioners gave evidence that the company was unable to pay its debts, and had ceased to carry on business for more than a year.

The Petitions were opposed by the Princess *de Reuss*, who was the holder of twenty fully paid-up shares.

The Vice-Chancellor dismissed both Petitions, being of opinion that the company was a purely foreign company, and that even if it came within the provisions of the *Companies Act*, 1862, it was not such a company as the Court ought, in its discretion, to order to be wound up in this country (1).

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(1) 1869. Dec. 18.
SIR R. MALINS, V.C. :— m/18/9/203

These are two Petitions for the purpose of winding up the *General Company for the Promotion of Land Credit, Limited.* Both Petitions are by creditors for a very large amount.

If this is to be regarded as a company subject to the provisions of the Act of 1862; if, in other words, it had been an English company, the facts presented being that it has ceased to carry on business, and that it is unable to meet its engagements, the case would be brought strictly within the Act of Parliament, and the order to wind up would be a matter of course, and as such it has been treated by counsel who have appeared to oppose these Petitions. But these Petitions are objected to on the ground that this is not properly a company to which the *Companies Act*, 1862, is applicable; and, as I understand the arguments, even if the Act of Parliament is strictly applicable, yet inasmuch as the power of the Court to wind up the company is a discretionary power, it is a case in which the discretion of the Court ought to be exercised, not by winding up this company, but by refusing the order which is asked for.

Now with regard to its being a company subject to the provisions of the Act, I think there can be no doubt whatever that it was the intention of the Legislature in passing that Act to make provisions which were applicable to companies which properly and substantially may be called English companies. It was no part of the object of the legislature to make enactments in this country for regulating the mode of conducting foreign joint stock companies, because this Act of Parliament provides not only how they are to be wound up, but in many respects how they are to be conducted. I repeat, it was not the object of this Act of Parliament to regulate the mode in which foreign countries should conduct their joint stock companies, nor could it have been nor was it any object of this Act of Parliament to provide the mode in which such companies should be wound up when they were unable to carry on their business.

The company now before me is a

L. J. G.
1870
In re General Company for the Promotion of Land Credit.

From this decision the Petitioners appealed.

Mr. *Fry*, Q.C., and Mr. *C. J. Hill*, for the Petitioners in the first Petition, and Mr. *Glasse*, Q.C., and Mr. *Waller*, for the Petitioners in the second Petition:—

This being a company registered under the *Companies Act*, 1862,

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company established for the purchase of land and the investment of money, as I understand, in land, principally in the *German Confederation;* but although the words of the memorandum of association would have warranted them in buying land in *England*, or in investing money in land in *England*, yet it is perfectly clear it never was one of the objects of this company to invest money on property in *England*, but their objects were intended from the very beginning to be confined to foreign investments in the *German Confederation*, in *Austria*, *Hungary*, and countries other than *England*. It is a remarkable thing, as bearing out this circumstance, that the memorandum of association was signed by seven persons who are all foreigners and all resident in *Belgium*, and who are so described in the memorandum of association. No doubt the memorandum of association provided that there should be a place of business in *England;* they have fixed upon a particular place in *Westminster;* but the operations of the company being intended originally not to be in this country, the result has been that no single operation ever has been carried on in this country. This is to all intents and purposes a mere foreign company, it has never had a transaction of business in this country. Every director is a foreigner, and the directors' meetings have been held in *Belgium;* there never has been a directors' meeting in *London* or in any part of *England*. What have they done in *England?* They have had a person who goes to the office, they have an officer, but what is the business transacted there? They keep a register of shareholders. It appears that the register consists of less than ten names. What was this person doing at the office from Monday morning until Saturday night? If letters came he received them, redirected them to *Brussels*, and put them into the post. Can that be called carrying on business? I have been referred to the 199th section of the Act, which applies to unregistered companies. Undoubtedly wherever there is a registered office that is the place of business within the meaning of the Act; but where there is no registered office, the principal place of business is to be what may be called the domicile of the company. Now where is the place in which this company has carried on its business? Certainly not in *England*. The registered office in *England* has been a mere colourable thing, for what purpose I cannot tell. Very likely it suited their convenience to have a registered office in *London*, and to register the company; they thought they would derive some advantage from it, but I have no hesitation in saying that this is a company which never ought to have been registered, and I am satisfied that if the Registrar of Joint Stock Companies could have known, when these articles were presented to him for registration, that there never would be any business of this company transacted in *England*, that it was to all intents and purposes a foreign company for foreign objects, to invest in with a registered office in *England*, is, for the purposes of the Act, an English company, and the Court has jurisdiction to wind it up. The Act does not require that the members of a company incorporated under it shall be English, or that the business of the company shall be carried on in *England*. The language of the

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foreign land, to carry on their business in a foreign country, he would have said, "this is not the object of the Act of Parliament and I decline to register the company, and if you think I am wrong you must apply to the Court of Queen's Bench for a *mandamus*, and that Court will decide the question." However, the difficulty was that he could not know at that time that the company would not substantially carry on its business in *London*, because, as the articles of association authorized them to do so, for aught he knew they might have made it their principal place of business, and if they had done so, undoubtedly the facts which have been presented to me would have obliged me to make an order to wind it up.

Now, under these circumstances, is it *ex debito justitiæ* that I should make an order to wind up this company? The passage which has been relied upon in the judgment of Lord *Cranworth* in *Bowes* v. *Hope Mutual Society* (11 H. L. C. 402) has been very often cited to me, and I am very familiar with it. The passage referred to is, that where a company is unable to meet its engagements it is *ex debito justitiæ* that an order to wind up should be made. But to what was Lord *Cranworth* there directing his attention? Clearly to a company which was within the provisions and objects of the Act of Parliament. I have already said that if this had been a company properly within the provisions and objects of the Act of Parliament I should have followed the *dictum* of Lord *Cranworth*, and I should have said that this is a case in which the company, having carried on operations and having incurred debts to a large amount, and being unable to pay these debts, it is a matter of course now to make an order to wind up. But Lord *Cranworth* was not directing his attention to such a case as that which I have before me, namely, the case of a company which has no business whatever in this country. If, then, I am not bound to make this order, ought I as a matter of discretion, under all the circumstances of this case, to make an order? I must have some regard to the practicability of working out the order if I make it, and although it is perfectly true, as has been argued, that where an order to wind up is made, and there are foreign contributories, this Court has the means of reaching them by putting them on the list of contributories, if they do not appear to shew cause; yet even in that case there is very great difficulty in obtaining a sufficient remedy and enforcing calls. I feel that there would be the very greatest difficulty in working this out, and why should I do it? Many cases have been cited to shew, and there is no doubt whatever, that this Court may make an order to wind up a company where the operations are to be wholly abroad, as in the case of the *Madrid and Valencia Railway Company* (3 De G. & Sm. 127), where the railway was to be made in *Spain*. The circumstance of the operation of the company being in a foreign country was not fatal to the order to wind it up. Vice-Chancellor *Knight Bruce* there says: "On reading

11 SC 11 Jur NS 643.

L. J. G.
1870
In re General Company for the Promotion of Land Credit.

6th section, "any seven or more persons," cannot be so restricted. The Court cannot look behind the registration, or refuse to recognise a company once registered. The only opposition to these

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the prospectus I find this passage, 'The affairs of the company will be conducted by a board of directors of *London*, assisted by a highly influential committee in *Madrid*.'" So that the business was to be transacted in *London*; the railway was to be made in *Spain*, but the supplies of money were to come from *London*, the banking accounts were to be kept in this country, the board of directors met in this country, and here all the substantial business was transacted, except that they sent engineers and a staff of workmen out to *Spain* to make the railway. Then he says, "As this was one of the stipulations under which the company was formed, it may, I think, be treated as subject to English, or at least as not exclusively subject to Spanish law, and under the circumstances of the case in other particulars I think it proper, notwithstanding the connection of the undertaking with a foreign country, to make the usual order for dissolving and winding up the company." It is perfectly plain from that judgment, and from the judgment of Lord *Cottenham* (2 Mac. & G. 169) confirming that decision, that they both proceeded upon the ground that substantially the business of the company was conducted in this country, that it was an English company, formed for the purpose of expending its capital in a foreign country, but still an English company.

I pressed the learned counsel to tell me of any case in which an order to wind up a foreign company has been made; that is, where all the operations were foreign, where all the funds were in a foreign country, and where nothing had been done in this country except the registration of the company. No such case has been cited. Many cases have been cited in which the orders were evidently made upon the ground that the company was substantially an English company. The first was the case of the *Madrid and Valencia Railway*, which I have just referred to. Then there is the case of the *Factage Parisien* (34 L. J. (Ch.) 140)(1) which was a company in which the management of the business was in *London*, although the money no doubt was to be spent in a foreign country, namely, in *Paris*. It was a company established for parcels delivery in *Paris*; the funds were supplied in *London*, there was a board of directors in *Paris*, but the business was substantially carried on in *England*, and therefore that brought it properly within the provisions of the Act. The *Peruvian Railways Company* (Law Rep. 2 Ch. 617) in the same manner was a company whose funds were to be expended in a foreign country in making a railway in *Peru*, just as in the case of the *Madrid and Valencia Company* the railway was to be made in *Spain*. In the *Peruvian Railways Company* so much of the money as was necessary to construct the railway was to be spent in a foreign country, but there was an English body of directors keeping a banking account in *England*, managing all their affairs in *England*, and keeping all their books of accounts here, so that if a person went to the office of that company he might obtain all the information that he wanted, and also see the directors, if he wanted to transact any business with them. That is not like this case, where a person might go to the office and find

(1) SC 11 Jur NS 121

petitions comes from a shareholder, and the Court will not allow persons to register themselves as an English company, and get all the benefit of limited liability under the Act, and then object to

L. J. G.
1870
In re
GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

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a person attending occasionally, merely asking whether there are letters and re-directing them; for that is all that has been done here.

The case of the *Commercial Bank of India* (Law Rep. 6 Eq. 517) is, perhaps, the nearest approach to the present case, because in that case it does not appear from the report that there was any board of directors in *England*. It appears that the business was principally conducted in *Bombay*, but even if there was no board of directors in *England* I must say I think there is a marked difference between the case of a company carrying on its operations or having its place of business in *India*, which, though not in all respects subject to our laws or amenable to the orders of this Court, yet is a British colony or a British settlement, and a company carrying on its operations in *Hungary*, *Austria*, or *Belgium*. However, for the reasons which Mr. *Cotton* explained, it is quite clear that in that case the company being mixed up with another company of very nearly the same name, the order proceeded upon those particular grounds, and cannot be regarded as an authority for that which is contended for here, that in such a company as this it is proper that I should exercise jurisdiction by winding the company up.

Now, I come to what I think is a most material authority, because I apprehend there is no substantial difference between an application to wind up under this Act of Parliament and an application to wind up under the Acts of Parliament which were in force at the time when Lord Justice *Knight Bruce* was sitting as Vice-Chancellor. I refer to the case of the *Union Bank of Calcutta* (3 De G. & Sm. 253, 257), which appears to me to be particularly applicable to the point now before me. That was the case of a bank carrying on business in *Calcutta*, and the Vice-Chancellor, *Knight Bruce*, says: "I assume (without, however, deciding) that according to the true construction of these Acts this Court has power to direct the winding-up of the company so far as this can be done in the absence from the jurisdiction of a large number of its members. It is not, however, in every case within the provisions of the Acts that the Court will interfere under them. It is incumbent on the Court not to act under these statutes where there are judicial grounds for holding it not to be expedient to do so." That states the general proposition, that it is a discretionary power, that the Court is to consider, having regard to all the surrounding circumstances, and all that is brought before it, whether it is proper that the Court should interfere, or whether there are judicial grounds for withholding its interference. The Vice-Chancellor then says, "This company was established in *India*, and is an Indian company;"—this, I say, is a company established in *Belgium*, and is to all intents and purposes a Belgian company — "but has correspondents here and very possibly in other parts of *Europe*, without which probably its business of banking could not be transacted. That, however, does not render it necessary to act under the statutory jurisdiction, if it is not shewn that there exist in this country the means of doing substantial justice, or more good than harm by so interfering." In the present the jurisdiction to wind up the company. Companies carrying on business abroad, and consisting mainly of foreign shareholders, have been wound up. *In re Madrid and Valencia Railway Com-*

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case I am clearly of opinion that if I were to make the order to wind up I should be doing a great deal more harm than good; for I should be making an order which it would be impossible for me practically to carry into effect. The Vice-Chancellor adds, "In my opinion the presumption is against the expediency of interfering in this case, and it is incumbent on the Petitioners to shew that the true view is not the *primâ facie* view. But everything that I have heard strengthens my persuasion that much more mischief would arise from acting on this Petition than from declining now to interfere and leaving those concerned to the remedies which, by the law of this country, or of *India*, or of both, are open to them, independently of the two statutes."

Now, that case was decided some time ago. It goes the whole length of my decision in the present case, but it is most material to observe that this principle of the exercise of the discretion of the Court has been acted upon more recently by the present Lord Chancellor when Vice-Chancellor, in the case of the *Natal, &c. Company* (1 H. & M. 639), in which, upon various grounds, he treated it as a discretionary power; and there, on account of all the circumstances of the company, and particularly the limited number of the shareholders, he declined to interfere, not being satisfied that it was expedient or proper that an order should be made. The very same reasoning applies to the present case, because there the shareholders were very limited in number; and here, as I collect, the shareholders are certainly not more than seven in number. It is said there are other shareholders who are not upon the register, but who ought to be put there. It is stated that they hold certificates of shares passing by delivery. That is a thing not cognisable under the Act of Parliament, and I think if I do not make an order, and the Prince *De la Tour and Taxis*, who has been referred to, and is said to be the holder of shares to an enormous amount, is not summoned before me to shew cause why he should not be put upon the register of shareholders in *England* in respect to these transactions relating to a foreign country to which he belongs, these parties have a remedy according to the law of the country in which they have carried on their business. I think they ought to have considered before they commenced their business whether the country in which they intended to carry on their business would afford them by its laws the means of protecting their business and carrying it on. But it does appear to me the very height of absurdity that I am to sanction this principle: that a company is to meet in *Brussels*, to carry on all its operations there, invest its moneys in foreign countries, and directly they find themselves in difficulty come to *England* and ask this Court, under an order to wind up, to apply the English law to this company, with which England has nothing to do.

With regard to the Petitioners in one of the Petitions, they are foreign creditors, and certainly I cannot regard them as having in the slightest degree entered into these transactions upon the ground of the English law. The creditors represented in the other Petition are a limited company, who have given

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

pany (1); *In re Peruvian Railways Company* (2); *In re Factage Parisien* (3); and even a company registered in *India* has been wound up as an unregistered company under the *Companies Act*, 1862: *In re Commercial Bank of India* (4). And in *Re Union Bank of Calcutta* (5) and *In re Natal &c. Company* (6) the jurisdiction was not denied, although the order was, under the circumstances, in each case refused.

In the present case the company did, in fact, carry on business in *England*, for they had an office here, and the debt with the *International Credit Company*, which is an English company, must be considered to have been contracted here. If the jurisdiction is established the Petitioners are entitled to an order *ex debito justitiæ*: *Bowes* v. *Hope Mutual Society* (7).

credit to this foreign company, carrying on its business in the manner that I have stated. I must presume that they gave them credit and took the shares, the shares which are said to be held by a trustee for them, not upon the authority of the English law, but upon the authority of and in reliance upon the law of the country in which the business of this company was carried on; and to the laws of that country in my opinion they are bound to appeal to recover their debt. I cannot regard them as having relied upon the English law in a case in which they were bound to know, for it was stated that they were carrying on business in the same house, that the registration of this company in *London* was a pure fiction. They knew perfectly well that no business was being carried on there. If they instruct their counsel gravely to tell me that in giving credit for a quarter of a million of money they had the slightest reliance on that room in which a man was sitting, calling himself a clerk of this company, with a book containing the name of eight or ten persons registered, the degree of folly is greater than I can possibly suppose even any joint stock company, limited, could be guilty of. Fortified, therefore, by these numerous authorities that this is a purely discretionary power, whether I regard it as a company that ought never to have been registered, or that, having been registered, it is not now in my opinion entitled to the protection of this Court under the *Companies Act*, on every ground, and with the best attention that I have been able to give to the case, for I regard it as a case of very great importance, I come to the conclusion, in the words of Vice-Chancellor *Knight Bruce*, that if I were to make an order to wind up this company I should be doing a great deal more harm than good. In every point of view I consider that I cannot make the order, and therefore both Petitions must be dismissed.

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(1) 3 De G. & Sm. 127; 2 Mac. & G. 169.

(2) Law Rep. 2 Ch. 617.

(3) 34 L. J. (Ch.) 140. 11 Jur NS 121

(4) Law Rep. 6 Eq. 517.

(5) 3 De G. & Sm. 253

(6) 1 H. & M. 639.

(7) 11 H. L. C. 389, 402. 11 Jur N.S. 665

L. J. G.
1870
In re General Company for the Promotion of Land Credit.

It is argued on the other side that the winding-up order, if made, would be nugatory, because the assets and the contributories are abroad; but by the comity of nations an English order may be enforced in a foreign country. The only question will be, whether there was a properly constituted English corporation, and on this the register will be conclusive.

Mr. *Bond Coxe*, for other creditors.

Mr. *Karslake*, Q.C., and Mr. *Locock Webb*, for the company.

Mr. *Wickens*, for three of the directors.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the opposing shareholder:—

This is not a company within the Act on which the Court has jurisdiction to wind up, or if it is technically within the Act, it is not such a company as the Court, in the exercise of its discretion, will order to be wound up. It is essentially a foreign company; all the subscribers of the memorandum of association are described as of *Brussels;* all its directors and registered shareholders are foreigners, and all its business and capital are abroad. The registered office in *London* is merely nominal, and the only agent in *England* is the secretary of the *International Company*, whose office is at the same place. It is said that the latter company hold shares in this company, but the shares are not registered in their name and the Court cannot treat them as shareholders. How can the Court effectually wind up such a company, whose sole assets consist of arrears of calls due from foreign shareholders living abroad, and real estates in foreign countries? Foreign Courts recognise the validity of the English law only in cases to which the English law is properly applicable. But we contend that this company is not properly subject to English law. It would not be recognised as an English corporation by a foreign Court. On the other hand, the creditors could obtain all the benefits which they are now seeking under the convention between this country and *Belgium* (*Lindley* on Partnership (1),) by taking proceedings in the Belgian Courts. Such a company was not contemplated by

(1) Page 1029.

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

the *Companies Act*, 1862, and it is a mere fraud on this Act that by registering itself and having a nominal office in *England* it should be entitled to be dealt with as an English company. The question whether an Act is applicable to transactions and persons in foreign countries depends upon the purview and objects of the Act: *Thompson* v. *Advocate-General* (1); *Wallace* v. *Attorney-General* (2); *Jefferys* v. *Boosey* (3). All the provisions in the *Companies Act*, 1862, contemplate an English company, having its place of business here, though it may have foreign shareholders and deal with property in foreign countries. The object of the Act was to get rid of technical difficulties, not to alter the rights of the creditors: *Oakes* v. *Turquand* (4). The certificate of the Registrar is conclusive that all the formalities required by the Act have been complied with: *Peel's Case* (5); but it is not conclusive as to the provisions of the Act being applicable to the company; this was decided with reference to a company registered under the *Joint Stock Banking Companies Act*, 1857, in *In re Northumberland and Durham District Banking Company* (6).

But assuming that the Court has jurisdiction, the 79th section of the Act gives the Court a discretion as to making or refusing the order: *In re Natal, &c., Company* (7). No doubt in the case of an English company admitted or proved to be insolvent the Court will, as a matter of course, make the order on the Petition of a creditor; but there is no authority to shew that the Court is bound to wind up or ever has wound up an essentially foreign company. In the cases of the *Madrid and Valencia Railway Company* (8), the *Factage Parisien* (9), and the *Peruvian Railways Company* (10), the great body of the shareholders were English, and the directors met and transacted the business of the company in *England*. In the case of the *Commercial Bank of India* (11) the company had transferred its business to another company which was being wound up in this Court under the Act, and the assets and liabilities of the two companies were inextricably mixed up together. But in *In*

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(1) 12 Cl. & F. 1.
(2) Law Rep. 1 Ch. 1. 11 Jur NS 937
(3) 4 H. L. C. 815, 955. 1 Jur NS 815
(4) Law Rep. 2 H. L. 325.
(5) Ibid. 2 Ch. 674.
(6) 2 De G. & J. 357.
(7) 1 H. & M. 639.
(8) 3 De G. & Sm. 127; 2 Mac. & G. 169.
(9) 34 L. J. (Ch.) 140. 11 Jur NS 129
(10) Law Rep. 2 Ch. 617.
(11) Ibid. 6 Eq. 517.

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

re Union Bank of Calcutta (1), Vice-Chancellor *Knight Bruce*, assuming that he had jurisdiction, held that he was not bound to exercise it, and refused to wind up a company carrying on business in *India*, being satisfied that there did not exist in this country the means of doing substantial justice or more good than harm by interfering under the winding-up Acts. This is a precisely similar case, and the creditors and the company should be left to enforce their rights in the foreign Courts.

But there is another objection to the interference of the Court. The articles give power to the company to make shares transferable by delivery; and in fact, it appears by the register that more than 179,000 shares have been made so transferable. The *Companies Act*, 1862, gives no power to companies to issue shares payable to bearer; on the contrary, the whole Act contemplates that there shall be a formal deed of transfer. See especially sections 22, 23, 25. The registration of shareholders, and the entry of the dates when they become and cease to be members, are incompatible with the notion of the shares passing by delivery. This is rendered still clearer by the subsequent statute, the *Companies Act*, 1867 (30 & 31 Vict. c. 131), which for the first time gives powers to companies to issue share warrants payable to bearer in the case of fully paid-up shares. The result is, that the articles of association in the present case contained illegal provisions, and ought not to have been registered, and the Court, by making the order now asked for, will be carrying into effect an illegal registration. It will be impossible to enforce any calls upon the holders of these scrip shares, because they are not legal transferees, nor are they on the register; and as these shares are the only ones which are not paid up, and the estates are mortgaged to their full value, the creditors will be able to recover nothing and the winding-up will be inoperative.

SIR G. M. GIFFARD, L.J.:—

I have listened to the arguments in opposition to this Petition, and I have paid every attention I could to the judgment of the Vice-Chancellor, but I confess that I cannot concur in those argu-

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(1) 3 De G. & Sm. 253.

L. J. G.
1870

In re General Company for the Promotion of Land Credit.

ments or in that judgment. If I were to do so, I think there would be great danger of gross injustice being done.

Now, first of all, who are the Petitioners? The Petitioners, in the first Petition, are a company, and they aver, and it is not contradicted, that there is owing to them nearly half a million of money, that they have served notice on the company and the company have not paid them; and it is proved in evidence that they hold in this company capital amounting to something like a million sterling. But it is said that this Court cannot make the order to wind up this company, first, because there are shares in the company transferable to bearer, and, secondly, because it so happens that the persons, property, management, and directorship of the company are abroad.

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First of all, whether these shares are so transferable to bearer that the persons who hold them are not members of the company is not a matter upon which I think it the least essential for me in the present state of the case to give any opinion; either those persons are members of the company and ought to be on the register, or they are not members of the company, and then that portion of the articles is *ultrà vires;* but it would not invalidate the partnership altogether, or render the company not a company, but would simply lead to this, that the portion of the articles *pro tanto* would be null and void.

Then with respect to the persons, property, management, and directorship of the company being abroad, in order that a company may be a company carrying on business within the meaning of this Act of Parliament, it must be a company which at the outset contemplates some description of management in this country, and some description of carrying on business in this country, although in substance all its operations may be abroad. I can see no reason why foreigners should not be persons to sign the memorandum of association. Just observe what the origin of this Act of Parliament was: When first joint stock companies were started they were found unwieldy associations, and it was found that they could not readily take proceedings, nor could proceedings readily be taken against them. In consequence of that several Acts were passed, more or less imperfect, but the object was really to clothe an ordinary partnership with something in the shape of a corporate capacity, in order, on

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

the one hand, that they might sue, and, on the other hand, that they might be sued. This is the whole history of these Acts relating to joint stock companies. The last Act of Parliament on the subject is the Act of 1862, and if we attend to its provisions we shall see plainly that any persons, if they contemplate a company which, according to the articles of association, may be managed and may be carried on here, and may have a directorship here, may lawfully sign that memorandum, and lawfully go through those forms which are necessary in order to have the company incorporated. Of course, when a company of that description is started, no one can tell whether it will succeed in this country or whether it will succeed in some other country. No one can tell how many persons resident in this country will become shareholders; no one can tell whether the chief part of the business of this company will be carried on here or will be carried on elsewhere. But if it is lawful for persons to start a company of this description, when once the company is started it is a corporation, and if it does not carry on business here, the fact that it does not carry on business here is a reason why persons may take proceedings here with a view of bringing that company to an end. Sect. 79 bears on that.

All the clauses which are important are the 6th, 11th, 16th 18th, and 23rd:—[His Lordship read these clauses and continued:—] The effect of these clauses is, that any number of persons may agree together to form a corporation, and if the thing which is contemplated by the articles is a thing which is a company within the meaning of the Act, I cannot possibly see why foreigners should not as well sign the memorandum of association as any other persons.

What, therefore, we have to consider in the present case is this: looking at this memorandum of association, and looking at these articles, did or did not the memorandum of association and the articles contemplate such a thing as is mentioned in this Act? Or in other words, is it within the contemplation of these two documents that there should be a real management of the company carrying on business, and having the seat of its business here? Now, let us turn to the memorandum. First, we find that the registered office of the company is to be situated in *England*;

L. J. G.
1870
In re GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

then the objects for which the company is established are "To procure the capital for any company in any country, but particularly in the states of the *German Confederation*, &c., to receive moneys on deposit, account current, or otherwise, with or without allowance of interest, and to receive on deposit title deeds and other securities." And again: "To enter into treaty, act or unite with, assist, amalgamate, buy up, or absorb any other company, either English or foreign, having for its object land or real estate." It is quite clear that it is a company which in its nature might be entirely carried on within the limits of this country, if the parties so pleased. It contemplated operations here, and it contemplated operations abroad. No doubt the great majority of companies that have been formed here do contemplate operations abroad.

Then we come to the articles of association. The 6th article is in the ordinary form, and the 14th relates to the provision for making shares transferable to bearers. I do not intend to express any opinion about that provision, for, as I said before, if it is altogether *ultrà vires* it does not make the whole scheme void, but it would be void *pro tanto*. On the other hand, if it is to be considered a clause applicable to the Act, it would follow that although you transferred shares to bearer you who happen to be on the list of shareholders do not get rid of your liability unless you take care that some other person is put on in your place. [His Lordship then referred to the 16th, 23rd, 24th, 39th, 128th, 149th, and 150th, and continued :—] With respect to the articles from the 67th to the 90th, which relate to the directors, it is not necessary to refer to them at length; but it is quite clear that if there had been a large business and a large body of shareholders here, although there was a fixed board of directors for seven years, these directors could have delegated their power to any one for the purpose of management, and in that case there would have been unquestionably a company carrying on business within the meaning of the Act.

No doubt the memorandum was signed by none but foreigners, and if it had been contemplated originally that there should be no management here and that there should be no business here, I can understand the application of the arguments which have been

L. J. G.
1870
In re
GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT.

addressed to me. But this is a company which did contemplate management and a business here; and it was incorporated here according to the forms prescribed by the law of this country; every shareholder who became a member of this company contracted to make himself liable to the laws of this country, as laid down, amongst other things, in this Act of 1862. That being so, the Petitioners are persons who, as I have stated, are creditors to the amount of nearly half-a-million of money, and who hold in this concern capital amounting to a million. The company appears and raises no objection, but we have here shareholders to a large amount, who appear and say that the company ought not to be wound up. The question which I asked at first was this: If it be proved that this is a corporation within the meaning of this Act of Parliament, what practical remedy have these creditors except by getting the order to wind up? Their debt is proved. I cannot take it that it is a foreign debt, and it matters not, in my opinion, whether it is a foreign debt or not; but the debt is not disputed, neither is it disputed that these Petitioners are entitled to shares to the amount which I have stated. But it is said that in my discretion, assuming the matter to be within the Act, I am not to make the order because there must be a difficulty in working it out. But every one of the persons who contracted to be members of this company contracted to make themselves liable to the particular law enacted by that Act of 1862. Then it is said that although I make this order, to the foreign Courts recourse will probably be necessary. But according to all the principles of international law the foreign Courts will recognise this winding-up, and will aid in carrying out any directions that may be given under it. The main object will probably be for the purpose of realizing the company's property, and I can see no reason why this company's property should not be realized abroad in the hands of the liquidators. That being so, my opinion is that there would be a denial of justice if the order to wind up was withheld. It is neither more nor less than the mode of execution which this Court gives to a creditor against a company unable to pay its debts. It has been said in more cases than one that where a creditor presents a Petition the order to wind up is due to him *ex debito justitiæ*. I do not say that that would apply in every case, but in this case most undoubtedly I think the creditor is entitled to the order to wind up, and I think that the greatest injustice would be done if that order was refused; I have no doubt that in some shape or other it can be worked out. How are the Petitioners, and the creditors generally, to get payment otherwise than by a winding-up? and why is a company constituted under the Act not to be subject to the provisions of that Act in favour of creditors with whom it has contracted, and who must be taken to have contracted on the faith of those provisions? I shall therefore make an order to wind up the company, which will be made on both Petitions.

Solicitors for the Petitioners: Mr. *Rand Bailey*; Messrs. *Baxter, Rose, Norton, & Co.*

Solicitor for the Company: Mr. *Holmes.*

Solicitors for the opposing Shareholders: Messrs. *Freshfield.*

In re TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

L. J. G.
1870
March 19.

Novation of Debt—Amalgamation of Companies—Policy-holders.

C. insured his life in the *T. Company*, which afterwards, in 1857, made over its business to the *A. Company*. At the time of this transaction circulars were sent to *C.*, informing him that the *A. Company* would be responsible on the policy, and requesting him to pay future premiums to the *A. Company*, and to send his policy to the *A. Company* to be indorsed. *C.* never sent his policy to be indorsed, but paid the premiums to the *A. Company*, and in 1863 accepted a bonus. The *A. Company* having become insolvent shortly after the death of *C.*, *C.*'s assignee applied for an order to wind up the *T. Company*:—

Held (affirming the decision of *James*, V.C.), that *C.* had accepted the *A. Company* as his debtor in place of the *T. Company*, and that the Petitioner had no *locus standi* to petition for the winding up of the *T. Company*.

9 Eq 446
Post 637.
10 Eq 128
5 Ch 869
— 376, —
— 37 and 14
7 Ch 653.
16 Eq 65,
10 Ch D. 31
5 Ch D. 2

THIS was an appeal by *Joseph Nunneley* from an order of Vice-Chancellor *James*, dismissing, with costs, a petition to wind up the *Times Life Assurance and Guarantee Company.*

The company was incorporated in 1849 under 7 & 8 Vict. c. 110, and its deed of settlement contained the following clauses, which are given on account of the reference to them in the judgment of the Vice-Chancellor, although the decision in the Court of Appeal did not turn upon them:

"233. That the board of directors shall cause it to be stated in every policy by which an assurance depending upon life or fidelity may be effected with the company, and in every deed by which an annuity or endowment may be granted or secured by the company, that the subscribed capital or other the stocks, funds, securities, and property of the company which, at the time of any claim or demand made in respect of such policy, or annuity, or endowment, shall remain unapplied or undisposed of in pursuance of the trusts, powers, and authorities in these presents or any deed of supplement thereto, shall alone be liable to make good all claims and demands upon the company in respect of such policy, annuity, or endowment; provided nevertheless, and it is expressly declared and agreed, that nothing in this present clause contained, or to be contained in any such policy, deed, or contract, shall limit or is intended to limit the liability of the shareholders of the company or any of them or their respective representatives or estates for or in respect of the performance and observance of the contract to be expressed in every such policy or deed according to the terms thereof, or to prejudice or affect the right of any person entitled thereunder to enforce, pursuant to the provisions and subject to the restrictions of the aforesaid statute, every or any judgment, decree, or order against the person, property, or effects of any shareholder for the time being, or any former shareholder."

Clause 236 provided machinery for passing a resolution at an extraordinary general meeting, for "dissolving" the company, if such dissolution should have been previously recommended by the directors, and for confirming the same at a second meeting to be held within twenty-one days after the former, and continued: "And if such resolution for dissolution shall be confirmed at such second meeting, then from the time of such confirmation the company shall, except for the purpose of winding up the affairs thereof, be dissolved, and the business thereof be concluded; and save by the means aforesaid no dissolution shall be had of the company.

"237. That immediately upon the dissolution of the company,

L. J. G.
1870
In re
TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

the board of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall, if practicable, obtain from the directors or managers of some other assurance company an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurance, annuities, endowments, or other contracts or engagements, when and as the times for the payment and satisfaction of the same shall successively arise, and shall cause to be transferred to some of the trustees of such other assurance company, or as the directors thereof shall direct, so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all existing policies, to enable the company from whose directors or managers the undertaking shall have been obtained to comply therewith; . . . and if any funds or property of the company shall remain after answering the purpose, and all other claims against the company, shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted into money, and shall cause the money arising from the remaining funds or property of which the same shall consist to be paid and distributed at such time or times as they shall think fit to and amongst the shareholders and other holders of shares in the capital of the company, according to their respective rights and interests therein."

Clause 238 was as follows:—

"That, notwithstanding any such dissolution of the company as hereinbefore provided for, all the powers, privileges, rights, and duties of the shareholders of the company and of the officers thereof, including the power to call and hold meetings of the company, &c., &c., and including the power to call for and enforce the payment of further instalments or shares, shall, until all claims and demands shall have been respectively satisfied and provided for as aforesaid, and until the final division shall have been made of the residue (if any) of such moneys as aforesaid, remain and continue in full force so far as the same may be necessary for winding up the concerns of the company and for enabling the board of directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payments and distribution as aforesaid."

In December, 1852, *Charles Coke Christie* assured his life, " with profits," with the company for two sums of £100; and by each of two policies, dated the 10th of December, 1852, after reciting that the assured had paid to the company the sum of £2 10*s.* 5*d.* as the premium for one year commencing on the 30th of November, 1852, it was witnessed that if the assured should pay the annual premium of £2 10*s.* 5*d.* to the directors of the company on or before the 30th of November in each year, "the stocks, funds, and property of the said company shall, according and subject to the provisions of the said deed or deeds of settlement of the said company, be charged with and become and be liable to pay to the executors, administrators, or assigns" of the assured, within three months after proof of his death, £100, together with " such further sums as, having under the provisions of the said deed or deeds of settlement been appropriated as bonus to this policy, shall have been added to the sum hereby assured." The policy also provided that, "the capital stock, or so much thereof as for the time being shall have been subscribed, and other the stocks, funds, and securities and property of the said company remaining, at the time of any claim or demand made, unapplied and undisposed of in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, shall alone be liable to answer and make good all claims and demands upon the said company; . . . and all persons having claims against the said company by virtue of any such policy shall only be entitled to make such claim effectual against the proper funds of the said company."

In January, 1857, an agreement was come to between agents of the *Times Company* and the *Albert Life Assurance Company*, for the transfer of the business of the former company to the latter. It was by the agreement among other things provided: 1. That the business of the *Times*, and all the benefits and goodwill thereof, should be made over absolutely to the *Albert;* and in particular that the *Albert* should be entitled to all premiums and moneys which had become due and payable, and which should

L. J. G.
1870
In re
TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

become due and payable, in respect of policies already granted or which should be thereafter granted by the *Times* prior to the payment of the sum thereinafter agreed to be paid by the *Albert*.

2. That the *Albert* should "take upon themselves, and become responsible for, the payment of the liabilities of" the *Times* in respect of all the life and guarantee policies, endowments, and annuities already granted or to be granted by them prior to the payment of the sum thereinafter agreed to be paid by the *Albert*, in all cases where the policy moneys should become payable by reason of the dropping of any life or lives on or after the 1st of December, 1856, or by reason of any default of fidelity where fidelity should have been guaranteed on or after the 1st of January, 1857, but in no other case; and "shall duly pay the same liabilities as and when they shall become due and payable, and fully indemnify the *Times* and the members of the same company of and from all actions, suits, claims, and demands, costs, charges, damages, and expenses in respect thereof or incident thereto."

4. That all the books, papers, and documents in the custody of the *Times* should be delivered over to the directors or officers of the *Albert*.

7. That the *Times*, at the request of the *Albert*, should, after the payment of the said sum of money thereinafter agreed to be paid, authorize and direct the holders of policies in the *Times* to pay the premiums and moneys upon or in respect of such policies to the *Albert*.

10. That the sum of £9500 should be paid by the *Albert* to the *Times*.

At an extraordinary general meeting of the *Times*' shareholders, held on the 13th of February, a resolution was passed, that the meeting having been informed by the directors that they had entered into the above agreement and recommended the dissolution of the company, it was resolved that the company should be dissolved. This resolution was duly confirmed at a second meeting, held on the 16th of February, and by the 4th of March the transfer of the business was completed.

On the 4th of March, 1857, the following circular letters, under the same cover, were issued:—

L. J. G.
1870
In re Times Life Assurance and Guarantee Company.

"*Times Life Assurance and Guarantee Company,*
"32, *Ludgate Hill, London,*
"4th March, 1857.

"Sir,—I beg to inform you that the business of the *Times Life Assurance and Guarantee Company* has been amalgamated with the *Albert Life Assurance Company,* of No. 11, *Waterloo Place, Pall Mall,* at which place the united business will be conducted henceforth, under the title of the *Albert and Times Life Assurance and Guarantee Company,* which company is now responsible for the sum assured under your life policy.

"I have to request, therefore, that future payments of premium may be made to *Harry William Smith,* Esq., the actuary and secretary of the said *Albert and Times Life Assurance and Guarantee Company,* or to his order.

"I have the satisfaction of adding that the *Albert Life Assurance Company* has been established nearly twenty years, and that by the amalgamation therewith of the business of the *Times Life Assurance and Guarantee Company* considerably increased security is afforded to the policy-holders of the latter; and I have therefore great pleasure and confidence in soliciting your recommendation and support of the *Albert and Times Life Assurance and Guarantee Company.*

"I am, &c.,
"*H. B. Sheridan,* Managing Director."

"*Albert and Times Assurance and Guarantee Company,*
"11, *Waterloo Place, Pall Mall, London.*
"4th March, 1857.

"Sir,—With reference to the annexed communication, I have the pleasure of confirming the fact that the above company has undertaken the risk of your life policy effected with the *Times Life Assurance and Guarantee Company,* and will be happy to make the usual indorsement on such policy on your forwarding the same to this office.

"I beg to hand you herewith a prospectus, and I shall be happy to supply such further information as you may now or at any future time require.

"Soliciting the favour of your influence on behalf of the *Albert and Times Life Assurance and Guarantee Company,*

"I am, Sir, your obedient servant,

"*Harry Wm. Smith,* Actuary and Secretary."

Copies of these circulars were received by *Christie.* He did not send in his policy to be indorsed, but paid his premiums, as requested, to the *Albert Company.*

In March, 1863, the *Albert Company* issued a printed circular "to persons interested in life policies." One of these circulars was sent to *Christie,* headed "*Times* Policy, No. 2319, on the life of *Charles Coke Christie; Albert Medical and Family Endowment Life Assurance Company,* 7, *Waterloo Place, Pall Mall;*" and was in the form of a letter from the secretary to the policy-holder, inclosing a report, shewing that a "further allotment of the surplus profits of the company" had been made "to the assured." It went on to say that the share pertaining to "the above-mentioned policy" might be applied in either of four ways: 1, in adding to the amount assured; 2, in present payment; 3, in reducing the premiums payable during the next three years; 4, in reducing all premiums; and requested to know which of the above modes the person addressed selected. On another page were given a list of the trustees, directors, &c., a statement of the "position, business, and progress" of the company, shewing that the assets exceeded £700,000, the subscribed capital was £500,000, and the annual income from life premiums exceeded £250,000. It contained, amongst others, this passage: "The directors are desirous of asking the attention of the proprietors to the very large amount of the company's new business, greater even than they themselves anticipated, whereby the advantage of the transfers which have taken place of other businesses to this company is made apparent." . . . "The above sum of £50,000 has now to be apportioned amongst the policy-holders according to their respective interests. . . ."

On the 6th of July, 1863, *Charles C. Christie* filled up and signed a form issued by the *Albert Company,* stating that he preferred the "second" mode stated in their circular of applying the share of profit pertaining to "my *Times* policy, No. 2319." He filled up and signed a similar form with regard to the other policy, No. 2320.

L. J. G.
1870
In re
TIMES LIFE
ASSURANCE
AND
GUARANTEE
COMPANY.

On the 5th of September, 1863, he signed the following cheque or order, which had been sent to him by the *Albert Company*; signed by the managing director:—

"Bonus.
"*Albert Life Assurance Company*, Established 1838.
Chief Office, 7, *Waterloo Place, Pall Mall, S.W.*
"*London*, 5th September, 1863.
"*London and Westminster Bank*, 1, *St. James's Square.*

"Pay to myself or order eleven shillings and five pence, being the amount of cash bonus allocated to the 31st December, 1861, upon policy No. 2319 on the life of myself effected with the *Times Life Assurance Company.*
"*Charles C. Christie*
"£0 11*s.* 5*d.* (legal holder of the above policy).
"*G. G. Kirby*, Managing Director."

He also signed a similar cheque with regard to policy 2320, and received the moneys mentioned in the two cheques.

By an indenture, dated the 16th of December, 1867, the two policies, by the description of "All those policies of insurance in the *Times Assurance Society* now amalgamated with the *Albert Assurance Society*, dated the 21st of October, 1852, and numbered respectively 2319 and 2320," were assigned by *Christie* to the Petitioner, *J. Nunneley;* and the deed was forwarded for registration to the manager of the *Albert*, who registered and returned it.

In December 1867, and December 1868, the Petitioner paid premiums to the *Albert*, and took receipts from the agent of the *Albert*, in the following form:—

"Receipt No. A. 16,168.
T. Policy, No. 2319.
Sum assured, £100.
Life *C. C. Christie.*
Premium, £2 10 5
Interest on £
for twelve months.
Agent,
Manchester Branch.

"*Albert Life Assurance Company*,
7, *Waterloo Place, Pall Mall,*
London, S.W.
Established 1838.

Received this 22nd day of December, 1868, the premium for the renewal of Policy mentioned in the margin hereof, the amount of which premium, and the period for which it is received, are also mentioned in the margin.

S. R. Bidder, Manager.
Per *J. Barlow.*"
L.S.

L. J. G.
1870
In re
Times Life Assurance and Guarantee Company.

On the 13th of August, 1869, *Christie* died, and on the 17th of the same month an order was made for winding up the *Albert Company*. It being expected that this company would not be able to pay its liabilities, *Nunneley* presented his Petition as a creditor for winding up the *Times Company*. Vice-Chancellor *James*, without hearing counsel for the Respondents, dismissed the Petition, being of opinion that *Christie* had accepted the liability of the *Albert Company* in substitution for that of the *Times Company* (1).

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(1) 1870. Feb. 14.

Sir W. M. James, V.C.: W.N. (70) 59

I am of opinion that this case is, in many important respects, substantially different from that of the *Family Endowment Society*, in which I made an order for winding up the society, which order was affirmed by the Court of Appeal (Law Rep. 5 Ch. 118).

In this case the Petitioner claims under an assignment of a policy assigned to him expressly as a policy "in the *Times Assurance Society*, now amalgamated with the *Albert*." He took the assignment with an intimation that the policy was merely at that time a contract, which had not ripened into a claim, with a society which was amalgamated with another.

Then when we look to what took place at the time of the amalgamation, which was as far back as the year 1857, nearly thirteen years before the presentation of this Petition, we find that the circumstances were these. The policy of the Petitioner (I shall consider it as his policy) was a policy by which the *Times* office undertook, in consideration of his paying to the directors of that society an annual sum or premium, that the assets of that company should, subject to the provisions of their deed of settlement, be liable, on the death of the life assured, to pay a certain specified sum. There was a condition that there should be a premium paid to the directors of that society. No premium since that year has ever been paid to any directors of that society. Possibly, and even probably, that circumstance having arisen through default, if it be a default, or through a wrong, if it were a wrong, of the society itself, in not having directors or officers to receive it, would give the persons who held the policy a right of action against the company which, by its own act, had prevented the person assured from complying with the terms of the policy. That is by the way.

But the society also in its deed of settlement had a provision, of which I must hold that every person who contracted with the society had knowledge, just as if every word of the deed of settlement had been written *in extenso* into the policy of assurance itself. By that means the person effecting the assurance had distinct notice that the company was to be dissolved in a certain manner and under certain circumstances, and the assets divided; that is to say, that the company, if it should be minded to dissolve, should call two general meetings for that purpose, and upon the passing of a resolution to that effect at the confirmation meeting the company should be dissolved. Then every creditor who had a present demand capable of being paid or satisfied must have the amount paid or satisfied. With regard to outstanding liabilities which might or might not ripen into

[illegible]

L. J. G.
1870
In re TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

Sir *Roundell Palmer*, Q.C., Mr. *Morgan*, Q.C., and Mr. *Cookson*, for the Appellant:—

This case is covered by *In re Family Endowment Society* (1),

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claims, which were contingent upon the policies being kept up, and of course expectant upon the dropping of lives, it was expressly provided that the directors were, if possible, to procure from some other company an undertaking to pay and satisfy the liabilities, and then, having made their terms and paid whatever the assets would allow to that other company, to enable them to comply with their undertaking, they were to be dissolved, and the business concluded, and all the existing assets divided amongst the shareholders.

That was the position in which the person who had effected the policy placed himself in regard to the society. It seems to me that this may have been a very foolish thing for him to do; but I suppose persons would assume that, if any company were selected to take the business and assets of their company, it would be one that was solvent and respectable, and it would be done honestly and *bonâ fide;* and if it were done honestly and *bonâ fide* there does not seem to be any substantial objection to it. Of course if a better office took the liability, it would be difficult to say that there was anything which would be injurious to the interests of the policy-holders. Nor must we try the policy of such a provision as that by the light which is now thrown retrospectively upon it by the fact of the *Albert*, eleven years afterwards, having failed. One must take it that the provision in the original deed of settlement, at the time it was made, was intended to be a provision for the transfer to a *bonâ fide* and substantial office. If it were otherwise I suppose this Court would have power enough to prevent the transfer to any sham office, or the doing of anything which was not honest and substantial.

That being so, the policy-holder, at all events, was in this position: when there was a choice given to him as to whether he would take the security of the *Albert*, he might either have taken the security or refused it. If he refused it, he might have enforced such claim as he might have at that time against the *Times* office for their breach of contract with him.

But then the *Albert* and the *Times* both write to the policy-holder, and say, "We have made arrangements"—not, as has been pressed upon me, arrangements for the amalgamation of the two companies; there was no fraudulent representation there; what they have done is, they have said, "We have made arrangements for the amalgamation of the business of the two companies"—that is to say, "the business of the *Times Life Assurance Company* has been amalgamated with the *Albert Life Assurance Company*, of No. 11, *Waterloo Place, Pall Mall*, at which place the united business will be conducted henceforth." That was in truth the nature of the transaction. One office was taking a small business of a small assurance office, having the benefit of the existing policies and contracts of that office. Then the *Times* say to the policy-holder: "The united business will be conducted henceforth under the title of the *Albert and Times Life Assurance and Guarantee* and the earlier authority of *Ex parte Gibson* (1) tends in the same direction. There is not enough to discharge the *Times Company*, the fair construction of what took place being that the liability

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(1) Law Rep. 5 Ch. 118.

Company, which company is now responsible for the sum assured under your life policy; and we have the satisfaction of adding that the *Albert Life Assurance Company* has been established nearly twenty years, and that by the amalgamation therewith of the business of the *Times Life Assurance and Guarantee Company* considerably increased security is afforded to the policy-holders of the latter." That is to say, the meaning is, not that you have got the security of the *Albert* in addition to the security of the *Times*, which is to continue liable, notwithstanding that provision in the deed of settlement; but you have got the security of a much better office—of an older and larger one. Then the *Albert* say, "We shall be happy to make the usual indorsement upon your policy on your forwarding the same to this office." The indorsement appears not to have been made; but following this the policy-holder goes and pays, not to the directors of the *Times Company*, or any persons whom he could have supposed to be the directors of the old *Times* office, but to the directors of the company who were carrying on the amalgamated business, the premiums on the policy, which premiums are accepted by that company.

It appears to me, if the case were reversed, upon that alone, if he had been minded to say, "I am not a creditor of the *Times*, which is an insolvent concern, I am a creditor of the *Albert*," that the *Albert* would not have had a shadow of a defence to such a claim on behalf of the policy-holder with whom they had so dealt.

Beyond that, there is this. The policies were policies with participation in profits; that is to say, participation in profits of the *Times* office. Then there comes a time when it is arranged there shall be a participation in the profits of the amalgamated company, the one with the new name which the *Albert* has taken; then a circular is sent to every policy-holder giving an account of the ~~policies~~ bonus, and in what way he may have it, either in addition to the amount assured, in present payment, or in reducing the amount of premium. Accompanying that, there is a document containing a very full account of what the society is. The one I have before me is one issued in the year 1863; but they are all in the same form. It gives an account of what the office is—"The *Albert Medical and Family Endowment Life Assurance Company*, established 1838;" there is the chief office, the city office, the branch office, trustees, directors, and so on. Then there is the "position, business, and progress" of the company; the assets exceed so much, the subscribed capital is so much, the annual income is so much; and then "the directors beg leave to submit to the proprietors a statement of the business for the year 1861," and so on. Then they give an account of what the whole business of the society has been; what the profit upon that whole business has been; and the mode in which the proportion of that business is to be distributed between the policy-holders of the whole company, entirely excluding, therefore, any possibility of a notion on behalf of the policy-holder, that when he received

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(1) Law Rep. 4 Ch. 662.

L. J. G.
1870
In re
Times Life
Assurance
and
Guarantee
Company.

of the *Albert Company* was additional: *Kirwan* v. *Kirwan* (1); *Lindley* on Partnership (2); *Winter* v. *Innes* (3). The form of receipt for premiums is consistent with our contention: *Re Man-*

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this circular and received the intimation that a bonus had been attributed to him, it possibly might be a bonus upon the business of the *Albert*, kept entirely separate and distinct from the old *Times Life Assurance and Guarantee Company*, if such a thing were possible.

It is quite manifest from this, that there was one business of the office, which was carrying on the amalgamated business with other amalgamated businesses. Then there is an offer made to this policy-holder. He accepts that offer, and does, upon the footing of the transfer of the business to the *Albert*, accept a share; it is a small one, it is true, but he does upon two occasions accept a share of the profits of the *Albert Company*, as being a person assured with the *Albert*.

After that I am of opinion that there is in this case a complete novation. The *Albert* has told the policy-holder, "We treat you as a policy-holder of ours." He accepts the position of being a policy-holder of the *Albert*; and after so many years it seems to me that it would be very oppressive upon the shareholders of the other company if I were compelled to come to a different conclusion in the case of a person who, with his eyes open, has really dealt with the *Albert*, and accepted the *Albert* as the office which was to pay him the amount of his policy when it became payable.

I believe in a case somewhat similar to this Vice-Chancellor *Malins* came to a similar conclusion, distinguishing the case of a policy-holder from that of the Petitioner in *The Family Endowment Case*, who was an annuitant, on the ground that there had been payment of premiums, and so on.

Mr. *Fry*:—It was the case of *In re National Provincial Life Assurance Society* (Law Rep. 9 Eq. 306, 314).

The Vice-Chancellor:—I do not know whether there was any bonus in that case.

Therefore, it would have been sufficient for me to have rested my judgment entirely upon the fact that the same point, in substance, had been decided by a co-ordinate branch of the Court, from which it would not be seemly for me to differ, unless that decision had been reversed or varied by a superior tribunal. But I have thought it right to go into this case at full length, and to give my reasons why, if it had come before me in the first instance, I should not have differed from the judgment of the learned Vice-Chancellor. Independently of that, I should have come to the conclusion that I have; and, therefore, I must dismiss the Petition.

Mr. *Roxburgh* asked for his costs.

The Vice-Chancellor said the Petition must be dismissed with costs as to the *Times*.

Mr. *Fry* asked for his costs. He said that considerable doubt existed as to whether there were seven members of the *Times* in existence. If so, winding up would be impossible.

The Vice-Chancellor refused to give any costs to Mr. *Fry's* clients; and directed the *Albert* liquidators to take their costs out of their own fund.

(1) 2 C. & M. 617.
(2) Page 447.
(3) 4 My. & Cr. 101.

L. J. G.
1870
In re
Times Life
Assurance
and
Guarantee
Company.

chester and London Life Assurance Association (1). The original contract was always treated as subsisting, and the *Albert Company* must be treated as acting on behalf of the *Times Company* in the dealings with *Christie.*

Mr. *Roxburgh*, Q.C., and Mr. *Higgins*, for the *Times Company ;* Mr. *Kay*, Q.C., and Mr. *Whitehorne*, for the *Albert Company;* and Mr. *Fry*, Q.C., and Mr. *Smithett*, for opposing shareholders in the *Times Company*, were not called upon.

Sir G. M. Giffard, L.J. :—

16 Eq 74

This case appears to me a very plain one, and quite distinct from the case of *In re Family Endowment Society* (2).

The facts are these :—A Mr. *Christie* effected two policies of assurance with the *Times Assurance Office.* Those policies were issued for one year with the premiums paid down, and then, if he chose to pay the same premiums every year up to the time of his death, he had a right to hold the *Times Company* to their bargain ; but then he was bound to pay the premiums to that company. The policies were effected in the year 1852. Mr. *Christie* went on keeping them up until March, 1857. I must take it that he received the circulars which were sent out in March, 1857. There are two circulars which are very important, and they seem to me to put it distinctly to Mr. *Christie*, whether he would or would not accept the responsibility of the *Albert and Times* office instead of the responsibility of the *Times Company ?* The first circular came from the *Times* office, and was in these terms: "Sir,—I beg to inform you that the business of the *Times Life Assurance and Guarantee Company* has been amalgamated with the *Albert Life Assurance Company*, of No. 11, *Waterloo Place, Pall Mall,* at which place the united business will be conducted henceforth under the title of the *Albert and Times Life Assurance and Guarantee Company*, which company is now responsible for the sum assured under your life policy." That, therefore, is a direct communication that the *Times* office and business was merged in another, a new and distinct company, and that that company was responsible for the policy. Then there comes this: "I have to request therefore that future payments of premiums may be made to *Henry W. Smith*, Esq., the actuary and secretary of the said *Albert and Times Life Assurance and Guarantee Company*, or to his order." That, I think, with reference to the form of the policy, is very material, because the policy required him to pay the *Times* office, and here is a request (founded on the statement that another and a different company was responsible for the future), that he will pay his premiums to the new company. I take it that if this had been assented to by the payment of the premiums, it would at once have released the *Times*, and it would have been an acceptance by the person who so paid of the liability of the new company. Then the circular goes on, "I have the satisfaction of adding that the *Albert Life Assurance Company* has been established nearly twenty years, and that by the amalgamation therewith of the business of the *Times Life Assurance and Guarantee Company*, considerably increased security is afforded to the policy-holders of the latter, and I have therefore great pleasure and confidence in soliciting your recommendation and support of the *Albert and Times Life Assurance and Guarantee Company*." Along with that came another circular from the *Albert* and *Times* office, which is in these terms: "With reference to the annexed communication, I have the pleasure of confirming the fact that the above company has undertaken the risk of your life policy effected with the *Times Life Assurance and Guarantee Company*, and will be happy to make the usual endorsement upon such policy on your forwarding the same to this office." No doubt the endorsement was not asked for, and the policy was not sent, but I take it if a policy-holder—his contract being with the *Times* office—that he was to pay the premiums to the *Times* office—receives those circulars and says nothing, but acquiesces in them by paying the premiums at the *Albert* office, that is precisely the same thing as if the policy had been sent in and endorsed, and he never could be heard to say that he had not accepted that responsibility and that risk which were offered to him. But the case does not stand simply upon those circulars. Matters went on from the year 1857 to the year 1863, the premiums being as I take it regularly paid. True it is that every receipt for a premium on the policy is marked as for a "*T.* policy," which meant a *Times* policy, but it is given with reference to the responsibility of the *Albert and Times* office, and the circulars had said in so many words that the *Albert and Times* office, if the policy-holder agreed, would stand in the place of the *Times* office. Things went on in that way until the year 1863, and in the year 1863 there comes a report. That again refers to the *Times* policy, but not so referring to it for the purpose of shewing it to be a thing for which the *Albert Company* was not liable, but for the purpose of distinguishing its number and amount, treating it as something which would give a right as against the *Albert Company*. The report begins in this way, "Sir,—I have the pleasure to send you by desire of the board, a report of the proceedings at an annual meeting of the proprietors of this company, held on the 24th of December last, by which you will perceive that a further allotment of the surplus profits of the company has been made to the assured." Then, after stating what those profits are, it says, "In conclusion, I desire to call your attention to the gratifying fact that the new business of the company"—that is, the *Albert Company*—"which, as per annexed report, recently reached in one year the unprecedented amount of," &c., "is still progressing most satisfactorily, and at a rate which must materially augment the future profits of the company." That bonus is accepted, and I quite agree, accepted as being in respect of a thing called "a *Times* policy," but that must be taken with regard to and in connection with the whole transaction, the circulars that had been received, the payments which had been made, and the fact known to the policy-holders, that this bonus was in point of fact a bonus paid out of the assets of the *Albert and Times Life Assurance Company*.

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(1) Law Rep. 9 Eq. 643.

(2) Law Rep. 5 Ch. 118.

That being so, I do not hesitate to say that in this case there was distinctly put to this policy-holder the proposition, "We tell you that this, which is a different company from the *Times Company*, which has absorbed the *Times Company*, has accepted and taken upon itself the responsibility of your policy; we ask you to pay to the directors of this, a different company, the premiums upon your policy; will you accept this risk?" And, without a word, the premiums are all paid, not to the *Times*, but to a different company. To my mind that is to demonstration a clear novation; and, that being so, the appeal must be dismissed with costs.

L. J. G.
1870

In re TIMES LIFE ASSURANCE AND GUARANTEE COMPANY.

Mr. *Fry*, Q.C., and Mr. *Smithett*, applied for costs on behalf of a shareholder in the *Times Company*.

The LORD JUSTICE GIFFARD :—It is my invariable rule not to give costs to shareholders in such a case. The company are the proper parties to resist the application for a winding-up order, and the appearance of shareholders is unnecessary.

Solicitors : Messrs. *Burton, Yeates, & Hart ;* Messrs. *Edwards & Edwards ;* Messrs. *Lewis, Munns, & Co. ;* Messrs. *Kingsford & Dorman.*

L. J. G.
1870
Feb. 17.

In re WESTERN LIFE ASSURANCE SOCIETY.
Ex parte WILLETT.

Winding-up—Appointment of Official Liquidator—Amalgamated Companies.

W N 70/ 99. [illegible]
14 Eq 496, 8, 9

In 1865 the *W.* assurance society made over its business to the *A.* company. In 1869 an order was made for winding up the *A.* company, and shortly afterwards a creditor of the *W.* society, who had not accepted the *A.* company as his debtor, obtained an order for winding up the *W.* society. After the transfer the *A.* company had carried on the business of the *W.* society, and all the transactions relative to that business were entered in the books of the *A.* company :—

Held (affirming the decision of *James*, V.C.), that one of the liquidators of the *A.* company was the most proper person to be appointed liquidator of the *W.* society, as a great saving of expense would thus be effected, and directions might be given for appointing separate solicitors to represent the interests of the two companies if any question should arise between them.

THIS was an appeal by one of the creditors of the *Western Life Assurance Society* from an order of Vice-Chancellor *James* appointing as liquidator Mr. *Price*, who was one of the liquidators of the *Albert Life Assurance Company.*

The *Western Life Assurance Society* was formed in 1842. In 1865 an arrangement was entered into for making over its assets and business to the *Albert Company*. The latter company, by the terms of the contract, dated the 14th of June, 1865, agreed that "the said company shall pay and satisfy all claims and demands upon the said society arising from assurances and other contracts and engagements when and as the times for the payment and satisfaction of the same successively arise, and shall take upon itself all other the liabilities of every description of the said society." This arrangement was carried into effect, and the books of the *Western Society* were handed over to the *Albert Company*, which did not carry on those books, but all the subsequent transactions relating to the business of the *Western Society* were entered in the books of the *Albert Company* among the entries of its other transactions. The case was the same with respect to various other companies, which had similarly become absorbed in the *Albert Company*.

In August, 1869, an order was made for winding up the *Albert Company*. Messrs. *Price* and *Young* were appointed liquidators. An annuitant of the *Western Society*, who had not accepted the substitution of the *Albert Company* as her debtors, not long afterwards presented a Petition to wind up the *Western Society*, and on the 4th of December, 1869, a winding-up order was made.

The creditor who had obtained the order proposed an independent person as liquidator. One of the contributories proposed Mr. *Price*, one of the liquidators of the *Albert Company*. The latter proposal was supported by an affidavit of the liquidators of the *Albert Company*, who deposed to the effect that, having regard to the contract of indemnity, the interest of the *Albert Company* in the liquidation of the affairs of the *Western Society* was paramount to any other interest, and that it was of vital importance to the shareholders of the *Albert Company* that the debts and liabilities and expenses of liquidation of the *Western Society* should be kept down as much as possible, and that the possibility of double proofs should be prevented; that the liabilities of the *Western Society*, owing to the accounts since the amalgamation having been kept only in the books of the *Albert Company*, could only be ascertained from those books; that they, the liquidators, had already necessarily obtained from those books considerable information as to the nature and extent of the assets and liabilities of each of the amalgamated companies; that it was expedient that the winding-up should be intrusted to persons representing the *Albert Company*, which was primarily liable; that a separate liquidator could not investigate the affairs of the *Western Society* without such continual reference to the books of the *Albert Company*

L. J. G.
1870

In re WESTERN LIFE ASSURANCE SOCIETY.
Ex parte WILLETT.

as would seriously interfere with its liquidation; and that, consequently, the appointment of a separate liquidator would lead to a dilatory and expensive course of liquidation. The Vice-Chancellor, after a full discussion, decided that it was best to appoint one of the liquidators of the *Albert Company* to be liquidator of the *Western Society*, saying that if any question of law arose on which the interests of the *Albert Company* and the *Western Society* were conflicting, a separate solicitor could be appointed to act for the *Western Society;* and that, having regard to the way in which the affairs of the two companies were mixed up, there would be a great saving of time and expense in having a common liquidator to do all matters which the liquidator had to do, independently of legal proceedings.

The creditor who had obtained the order for winding up the *Western Society* moved by way of appeal from this decision.

Mr. *Kay*, Q.C., and Mr. *Waller*, for the Appellant:—

The *Albert Company* absorbed a number of other companies besides the *Western Society*. The liquidators of the *Albert Company* will have a bias to protect the *Albert Company*. Difficult questions as to novation will arise. In some of the companies the liability was unlimited; in the *Albert Company* it was limited by the form of policy used by that company; and it is necessary for the purposes of justice that the different companies should not be represented by the same persons. We do not say that there should be a distinct liquidator for each company, but there ought to be some classification. The judge can exercise such a control over the proceedings as will be a check upon needless expenses, but he cannot secure the exercise of an independent judgment by a man who is called upon to serve two masters.

Mr. *Fry*, Q.C., appeared for a body of creditors, but as they were not Appellants the Lord Justice declined to hear him.

Mr. *Cracknall*, for the official liquidator of the *Western Society*.

Sir *Roundell Palmer*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Higgins*, for the official liquidators of the *Albert Life Assurance Company*, in support of the order, were not called upon.

SIR G. M. GIFFARD, L.J. :—

This is an appeal against the appointment of a liquidator, the Vice-Chancellor having exercised his discretion as to that appointment. I have listened with attention to the reasons which have been given to shew that discretion not to have been well exercised, but I confess I cannot accede to them. If they were sound, the result would be that a multitude of liquidators must be appointed for these different companies. Now there must be an immense mass of ordinary administrative business relating to all these companies, the affairs of which are very much mixed together, and whatever gentlemen make themselves masters of the affairs of the *Albert Company*, must, to a great extent, be masters also of the affairs of all the other companies. There will, therefore, be a great saving of expense if the same liquidators are appointed both of the *Albert* and all the other companies. It is urged, however, that there are adverse questions between the companies. That, no doubt, is true. But then, first of all, it is to be observed that all proceedings are in the names of the companies, and not in the names of the liquidators; in the next place, the liquidators are officers of the Court, and it is very easy to appoint separate solicitors, who, in cases of this sort, would take care of the interest in respect of which they are appointed; in addition to which the whole matter is under the direction and control of the Vice-Chancellor in Chambers; and I have no doubt whatever that he will give such directions with respect to the raising of these particular questions as will enable these separate solicitors to bring them fairly and completely before the Court. That being so, I have no hesitation whatever in affirming this order, and dismissing this application with costs.

I think that there would have been great and grave ground for dissatisfaction if any other course had been adopted than that which the Vice-Chancellor has thought fit to adopt.

Solicitors: Messrs. *Evans & Co.; Mr. Manning;* Messrs. *Lewis, Munns, Nunn, & Longden.*

L. J. G.
1870
Feb. 18.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN.

MITCHELL'S CASE.

Inspectorship Deed—Winding-up—Calls—Proof under Deed—Order on Debtors.

Post 494
6 Ch 584
13 Eq 310

Two shareholders in a company ordered to be wound up voluntarily executed as debtors a deed of inspectorship, to which the debtors, the inspectors, and all creditors who would have been entitled to prove against the debtors under an adjudication of bankruptcy, were expressed to be parties. The deed contained no actual assignment of the estate of the debtors, but contained provisions for converting their estate into money, and applying it in payment of the debts due to the creditors; and also contained provisions for a release being given to them in certain events. The deed was duly registered in bankruptcy:—

Held (reversing the decision of *Stuart*, V.C.), that the Court of Chancery ought not to make an order in the winding-up upon the debtors for payment of calls, though the calls were made since the deed was executed, but that the calls were debts proveable under the deed of inspectorship.

BY an indenture dated the 4th of January, 1867, and made between *J. W. Mitchell*, *R. Aspinall*, and *R. S. Cumming* (the debtors), of the first part, *A. F. Paull*, *E. W. Wingrove*, *C. F. Cumming*, and *D. C. Brown* (the inspectors), of the second part, and the several persons, companies, and firms who, at the date of the said indenture, were respectively creditors of the said debtors, or of one of them, or of *Mitchell* and *Aspinall* in respect of their late partnership, or who would be entitled to prove under a joint adjudication of bankruptcy against the said debtors, had such been made on the day of the date of the said indenture, of the third part, provisions were made for placing the estate and effects of the debtors under inspectorship, and it was declared that their joint estate and separate estates should be administered in accordance with the principles, rules, and practice of the English bankruptcy law, or as near thereto as circumstances would permit, regard being had to the terms of the said indenture. By Art. 9 of the deed, it was declared that all the moneys and proceeds of the joint estate and separate estates should, after payment of costs and charges, be applied in or towards paying the debts due from the said debtors, or any of them, to the creditors, regard being had in the application of the said joint and separate estates to the rules, rights, and equities which govern the administration of joint and separate estates in bankruptcy. By Art. 21 the debtors agreed, when required by the inspectors, to convey or assign the joint estate and separate estates to the inspectors. By Art. 23, it was provided that when the estates had been fully administered, and the estates assigned, and the inspectors should certify that one or more of the debtors ought to be released from the debts due to the creditors, then the debtor or debtors named in such certificate should thenceforth be absolutely released from the debts due by them or him to the creditors.

This deed was registered in the Court of Bankruptcy on the 21st of June, 1867.

Mitchell and *Aspinall* were shareholders in the *Bank of Hindustan, China, and Japan, Limited*, an order for the voluntary-winding-up of which had been made in December, 1866; and in July, 1869, a call upon *Mitchell* and *Aspinall* for £517 was made in the winding-up. The official liquidator applied to the Vice-Chancellor *Stuart* for an order on them for payment of this sum, and the Vice-Chancellor, on the 31st of January, 1870, made an order accordingly upon them for payment within four days (1).

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(1) 1870. Jan. 31.

Sir John Stuart, V.C., said that, on the careful perusal of the 197th and 198th sections of the *Bankruptcy Act*, 1861, under which this deed of inspectorship had been registered, he could see no reason to doubt that it was for the Court of Bankruptcy to say whether process for the sum of £517, or any part of it, should issue against these contributories. The amount due from them as contributories had been duly ascertained in this Court, and it was for this Court to make an order for the payment of what was found to be due. When the order for payment had been made, the Act of Parliament made it the duty of the liquidator to apply to the Court of Bankruptcy, under the 198th section, for leave to issue process to enforce payment. All questions as to the deed of inspectorship were, by the 197th section, expressly committed to the Court of Bankruptcy; but these contributories had now asked this Court to decide the question as to the deed of inspectorship, and as to their rights to protection under the *Bankruptcy Act*. It was said that the 198th section gave to the Court of Bankruptcy no right to give any protection against the process of this Court for contempt; but on this point the language of the Act left no doubt. All process of every kind, whether against the estate or the person of the bankrupt, was within the language of the section. Process of this Court for contempt was process against the person, and as such was certainly within the words of the section. His Honour would have had no doubt as to the construction of the statute were it not for the cases of *Ex*

L. J. G.
1870
MITCHELL'S CASE.

Mitchell and *Aspinall* now moved, by way of appeal, to discharge this order.

Mr. *Karslake*, Q.C., and Mr. *E. C. Willis*, for the Appellants:—

The order of the Vice-Chancellor requires a double process, first in this Court and then in the Court of Bankruptcy, and is contrary to *Ex parte King* (1), and also to *Financial Corporation* v. *Lawrence* (2). This deed would be a good defence at law to an action by the liquidators, and might be pleaded by the debtors: *Rossi* v. *Bailey* (3), *Corner* v. *Sweet* (4).

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parte King (Law Rep. 4 Eq. 566; Ibid. 3 Ch. 10), and *Financial Corporation* v. *Lawrence* (Law Rep. 4 C. P. 731), in which cases these matters were brought before the Court in such a way as called for a decision on the validity and scope of deeds registered in bankruptcy. But from the way in which the question was presented to the Court in *King's Case*, and the course which the argument took, the language of the Act of Parliament seemed in no degree to have attracted the attention of the Court; nor was there any reason stated for the construction which was assumed to be the proper construction. As to the case of *Financial Corporation* v. *Lawrence*, the only question submitted to the Court of Common Pleas was the validity of the deed and the extent of its operation, so that the question of jurisdiction was kept out of view. In the present case it had been argued that the liquidators should have proved in bankruptcy for the estimated amount of the call under the 77th section of the *Companies Act*, 1862; but it did not seem that they were bound to do this. The enactment was permissive only, and having a discretion they had a right to exercise it in the way which seemed to them most beneficial to the company. According to the words of the 197th section, it was for the Court of Bankruptcy to determine all questions arising under the deed according to the law and practice of bankruptcy, so far as they might be applicable; and the 198th section prohibited any execution against the property or person of the bankrupt without the leave of the Court of Bankruptcy. This left the question of protection, and the extent to which the protection was to be given, exclusively to the Court of Bankruptcy in which the deed was registered. If the Court of Chancery, disregarding the Act of Parliament, were to entertain the question of protection, and to decide how far the deed was a protection, or whether it was a protection at all, it would create great confusion, and interfere for no useful purpose with the statutory jurisdiction in bankruptcy. Entertaining these opinions as to the construction of the statute, and considering that the authority of the Act of Parliament was the highest authority, His Honour must now make an order for payment of the ascertained balance. The duty of the liquidators would be to apply to the Court of Bankruptcy for leave to issue process according to the course of that Court.

(1) Law Rep. 4 Eq. 566; 3 Ch. 10.

(2) Ibid. 4 C. P. 731.

(3) Ibid. 3 Q. B. 621.

(4) Ibid. 1 C. P. 456. /12 Jur NS 413

Mr. *Greene*, Q.C., and Mr. *Lindley*, for the official liquidator:—

The Court of Chancery in the winding-up ascertains what is the liability of the contributory, though execution cannot be enforced without the leave of the Court of Bankruptcy. The question is, whether this debt would be proveable in the bankruptcy; and we say it could not be proved, and was not included in this deed. This deed contains no assignment of the estate of the debtors, and names no trustees against whom the official liquidator can proceed. Who is to be put upon the list as a contributory? The mere call is not enough, and an order to pay is necessary to fix the sum due, and the person, which is all that it amounts to. If made in any other shape the liquidator would have to prove the whole case before the Court of Bankruptcy. As it is, we can go before that Court and make our claim upon this order. *Hastie's Case* (1) shews that a bankrupt remains liable for calls.

SIR G. M. GIFFARD, L.J.:—

The first question to be determined in this case is, whether this call is a debt proveable under the inspectorship deed. I quite agree that if this call is a debt not proveable under the deed, as in *Ex parte King* (2), then the form of order which has been adopted would be a proper form, because the debtors would beyond all question be liable to pay. But when we look at the deed, I think the answer to the question is sufficiently plain, because the parties of the third part include all persons who could prove under an adjudication of bankruptcy, and if under an adjudication of bankruptcy this call could be proved it would make the official liquidators parties to the deed.

We need not go into the law, which is now settled that if bankruptcy, or that which is its equivalent, comes after the order for winding up, there may be a proof. That is settled by *Ex parte King*, and has, I think, been followed by decisions at common law. But then it has been said that these are creditors whose debts were not due according to the 9th article of the deed. That, however, depends upon how we read the word "due," as used there. It is a very comprehensive term, and to my mind it does not mean a

13 Eq [illegible]

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(1) Law Rep. 4 Ch. 274.

(2) Law Rep. 3 Ch. 10.

debt payable at the moment, but a debt which existed at the date of the deed, and is therefore proveable under it. That is quite manifest from the other terms of the article, which provide that this property is to be applied "in or towards paying the debts due from the said debtors, or any of them, to the said creditors, regard being had in the application of the joint and separate estates for the payment of the said joint and separate debts to the rules, rights, and equities which govern the administration of joint and separate estates in bankruptcy." This, of course, means that the estate is to be administered by paying everything which, if there was a bankruptcy would be proveable under the bankruptcy. That, therefore, disposes of that part of the case.

Then we come to the other part of the case, namely, whether it was right that the order should be made in this form, directing these debtors actually to pay the sum within four days, there being no dispute as to the amount. Now, I do not think that this question is open to me. It is concluded by *Ex parte King* (1). That case was decided by the present Lord Chancellor as Vice-Chancellor, and then by Lord *Cairns* as Lord Justice, and I do not consider myself at liberty to overrule an antecedent decision of this Court, unless, of course, it was shewn that there had been some inadvertent mistake. In that case, beyond all question, every one of these grounds must have been considered by the Court; and the Court must have determined that the deed was good, and that a certain portion of the debt was proveable under the deed, and therefore made the order in a particular form, but that another portion was not proveable under the deed, and that, therefore, as regarded that portion, there ought to be an order on the debtors for payment.

I cannot help thinking that the Vice-Chancellor *Stuart* has overlooked what the result of the decisions of the Courts of Common Law has been; because if his order stands, it would be wrong in a Court of Common Law to consider any one of these inspectorship deeds; or, in other words, these deeds could not be properly pleaded as an answer to any action, but every person whose affairs were wound up under a deed of this sort would have no defence to an action—would be compelled, whether he liked it or not, to have judgment against him, unless he had some other ground of defence, and would then be obliged to go to the Court of Bankruptcy and have it determined there whether execution should be issued or not. That would, in the first place, be a most inconvenient state of the law, and in the next place would be opposed to numerous cases at law in which the Courts of Common Law have taken upon themselves to decide whether the deed was pleadable or not, on the ground that if the deed was a good deed, and was pleadable, it followed that there ought to be no judgment at law.

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(1) Law Rep. 3 Ch. 10.

That being so, I am relieved from very much of the difficulty of setting my own opinion against that of the Vice-Chancellor, because I find the opinion of the Courts of Common Law, the opinion of the present Lord Chancellor, and the opinion of Lord *Cairns*, on the subject, and I may venture to say that I think these opinions quite consistent with good reason and good sense. The inconveniences of the other alternative would be very grave. The Legislature has enacted in so many words that a deed of this sort, if it fulfils certain conditions, shall have precisely the same effect as if it were executed by all the parties, and it has not been argued that this deed does not contain all the requisites under the statute. The only argument has been that it does not apply to this particular debt. But we have in this deed provision for a release, and the deed has been for all practical purposes executed by this company and by the official liquidator. Suppose there had been in this winding-up a compromise under which 10*s*. in the pound had been taken, and then the official liquidator of the company having taken 10*s*. in the pound came to this Court and asked for an order to make these debtors pay within four days. The answer would have been, the Court can see whether there has been such a compromise or not, and whether there has been a release upon the terms of such a compromise or not, and if there has been a release upon the terms of such a compromise the Court will at once refuse to make such an order, inasmuch as the sum was not due and was not recoverable against the debtors. And that really is precisely and exactly what this case is.

Mr. *Lindley* suggested that the official liquidator was at all events right, this being a voluntary winding-up, in coming here to

L. J. G.
1870
MITCHELL'S CASE.

get the actual amount settled by the Court. In some particular cases this may possibly be a matter of discretion, but in this case there has never been any dispute about the amount; and certainly I should hesitate long as to settling the amount on such an application, because the parties would simply have come here to have the amount settled by this Court, which has no power whatever under the winding-up to administer the trusts of a deed in the Bankruptcy Court. And I do not hesitate to say that a much more proper course, and a course which, except in very rare instances, I should insist upon, would be if there was any dispute between the liquidator under a voluntary winding-up and the persons who were trustees of a deed of that sort, that they should apply to the Court of Bankruptcy. They could as readily, and probably more readily, and at much less expense, get their accounts settled in the Court of Bankruptcy than they could by coming here first to have the amount fixed by what is termed a Call Order, and then afterwards going into the Court of Bankruptcy for an order in the administration.

Under all the circumstances, therefore, the proper course, I think, is to discharge the order of the Vice-Chancellor. But I think it would be right to make a declaration that the amount of the call is a debt properly proveable under the deed; make no other order except to discharge the order of the Vice-Chancellor, and give the Appellants the costs below. I cannot give them the costs of the appeal.

Solicitors: Mr. *J. Harwood;* Messrs. *Ashurst, Morris, & Co.*

In re ESTATE COMPANY, LIMITED AND REDUCED.

L. J. G.
1870
Mar. 19.

Companies Act, 1867—*Reduction of Capital—Discontinuance of the Use of the Words* "*and reduced.*"

The expiration of three months from the date of the final order is a proper period for discontinuing the addition of the words "and reduced" to the title of a company whose capital is reduced under the *Companies Act*, 1867.

Order of *Stuart*, V.C., varied.

IN this case the company had applied to Vice-Chancellor *Stuart* for an order confirming a special resolution for reducing their capital. The Vice-Chancellor made the order, but fixed the date of the dissolution or winding-up of the company as the time until which the words "and reduced" should form part of the title. The company, which appeared to be in prosperous circumstances, appealed from so much of the order as required this continued use of the words in question.

Mr. *Greene*, Q.C., and Mr. *Wickens*, in support of the appeal, referred to *In re Sharp, Stewart, & Co.* (1), and General Order of the 21st of March, 1868, rule 20.

The LORD JUSTICE GIFFARD considered that the rule in *In re Sharp, Stewart, & Co.* ought to be followed, and fixed the period of three months from the date of the Vice-Chancellor's order as the period during which the use of the words "and reduced" must be continued.

Solicitors: Messrs. *Walters & Gush.*

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(1) Law Rep. 5 Eq. 155.

L. J. G.
1870
May 6, 12.

11 Eq. 95.

In re HARRISON'S ESTATE.

Will—Construction—Devise without Words of Limitation—Feesimple implied from Gift over—Substitution.

A testator, by his will, made in 1806, devised all his real estate to his two brothers during their joint lives and the life of the survivor; and, after the death of the survivor, unto and equally amongst all the children of his said brothers who should be then living; and in case of the death of any of the said children in the lifetime of his said brothers or the survivor of them, leaving lawful issue, then he devised the part or share of such deceased parent or parents unto and equally amongst all his, her, or their children who should be then living; and he devised the residue of his real and personal estate to his widow, her heirs, executors, administrators, and assigns:—

Held (affirming the decision of *Malins*, V.C.), that the children and grandchildren of the testator's brothers took estates in feesimple in their respective shares.

In construing a will made before the *Wills Act*, the rule that an indefinite devise may be enlarged into a feesimple by a gift over in a particular event is not confined to a devise of a vested interest, but is equally applicable to a contingent devise.

THIS was an appeal from a decision of Vice-Chancellor *Malins.*

John Harrison, by his will, dated the 26th of December, 1806, devised all his messuages and hereditaments to his wife for her life, chargeable as therein mentioned, and from and after her death to the testator's two brothers, *James Harrison* and *William Harrison*, during their joint lives, and on the death of either of them the survivor to take the whole for his life, and the testator then proceeded as follows: "And from and immediately after the decease of both, or the survivor of them, my said brothers *James* and *William*, I do hereby give, devise, and bequeath all and singular my said several messuages, or dwelling houses, tenements, hereditaments, and premises, with their respective appurtenances (subject and charged as aforesaid), unto and equally amongst all and every the child and children of my said brothers, *James Harrison* and *William Harrison*, which shall be then living, equally share and share alike, to take as tenants in common, and not as joint tenants; and in case of the death of any of them, the said child or children of my said brothers, in the lifetime of both or either of them, my said brothers, leaving lawful issue living, then

SC on appeal. 10 Eq. 533.

L. J. G.
1870
In re HARRISON'S ESTATE.

I give, devise, and bequeath the part or share of such deceased parent or parents of such child or children as aforesaid unto and equally amongst all and every his, her, or their child or children, as the case may happen to be, which shall be then living, share and share alike, such child or children as aforesaid to have or take no greater or other share than the parent or parents of such would have taken or been entitled to if living; and, as to all the rest, residue, and remainder of any real and personal estates of what nature or kind soever which I shall or may die seised, possessed of, or entitled to, and not hereinbefore by me otherwise disposed of, I give, devise, and bequeath the same and every part thereof unto my said wife, her heirs, executors, administrators, and assigns."

The testator died in August, 1807. *William Harrison* died in 1809, and *James Harrison* in 1835. At the latter date there was a daughter of *James Harrison* living, and children of deceased children of both the brothers.

Part of the testator's real estate had been purchased by the Corporation of *Liverpool* under the compulsory powers of an Act of Parliament, and the purchase-money paid into Court.

The persons entitled under the children and grandchildren presented a Petition for payment of the money to them, under which inquiries were directed, and a summons was afterwards taken out for determining the rights of the parties. The summons having been adjourned into Court, the Vice-Chancellor decided that the effect of the devise was to give an estate in fee in the respective shares to the children of the testator's brothers living at the death of *James Harrison* and the issue then living of such as were dead. From this decision the heir-at-law of *Margaret Harrison*, the residuary devisee, appealed.

Mr. *Cotton*, Q.C., and Mr. *Wickens*, for the Appellant:—

The will having come into operation before the 1 Vict. c. 26, the gifts are all *primâ facie* for life only. This is not a case of substitution of the issue for the parents, but an original gift to the testator's nephews and nieces, and the children of such nephews and nieces as should be dead. All are put into one class, and there is no gift over. The principle of *Frogmorton* v. *Holyday* (1) and that class of cases, therefore, does not apply. They were decided according to the rule which has been laid down, that a devise without words of limitation may be enlarged into a fee by a gift over in a particular event, such as the devisee dying under twenty-one. But it would be extending the rule beyond what has ever been done to apply it in a case where all the devisees are in one class and there is no gift over. It is contended on the other side that the effect of the limitation is the same as if there had been a gift over; but the rule is a technical one, and ought not to be extended: *Loring* v. *Thomas* (1); *Doe* v. *Cundall* (2); *Doe* v. *Holmes* (3); *Toovey* v. *Bassett* (4).

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(1) 3 Burr. 1618.

The Respondents also rely upon the cases in which the use of the word "share" or similar words by a testator has been held to indicate an intention to pass the fee. But those are cases in which the testator used the word of his own interest in the property, not of the interest which he had given to the devisees.

Mr. *Joshua Williams*, Q.C., and Mr. *Kekewich*, for persons claiming under the children of the testator's brothers:—

We admit that, strictly speaking, there is no substitution, and that the devisees are all put into one class; but the question is entirely one of the intention of the testator, and here there is a clear intention to give the fee both to his nephews and their children; for if the testator had meant his nephews to have estates for life, he would have given their shares to their children, whether his nephews had died before or after the survivor of *James* and *William Harrison*; whereas, according to the Appellant's construction, if a nephew died just before that time, his issue would have the share, but if just after, his issue would get nothing. And there can be no distinction between the interest of the nephews and that of their children, for it is clear that what is given to one member of the class is given to the others. The rule, according to which an indefinite gift is enlarged into a fee, is not so narrow as the Appellant represents. It is not necessary that there should be the gift of a vested interest, with a devise over; an alternative gift has the same effect: *Moone* v. *Heaseman* (1); *Fearne's* Posthumous Works (2); *Robinson* v. *Grey* (3); *Doe* v. *Frost* (4). We also rely on the use of the word "share." There is no force in the distinction attempted to be drawn between the word when used of the testator's interest, and when used of the interest given to the devisee: *Bebb* v. *Penoyre* (5); *Paris* v. *Miller* (6); *Bentley* v. *Oldfield* (7).

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(1) 1 Dr. & Sm. 497. 7 Jur. N.S. 1186

(2) 9 East, 400.

(3) 2 Wils. 80.

(4) 10 East, 460.

Mr. *Cotton*, in reply.

May 12. SIR G. M. GIFFARD, L.J.:—

The question in this case arises on a will which came into operation before the *Wills Act*, and it is whether the words of devise immediately preceding the residuary clause do or do not pass a fee. The question is not affected by the residuary devise, for it might well have operated on failure of the preceding devise, the interests created by which are all contingent. In the earlier part of the will life interests are created, and the material words after these life interests are as follows [His Lordship then read the clause from the will]:—

Under the law as it existed before the *Wills Act*, it was a rule, as is well known, that a mere general devise of land did not carry the fee; but there were well-established exceptions to this rule, one of them being, that a devise to *A.*, and in case of his death before a given period or periods, or under given circumstances, to *B.*, did carry the fee. The reason or principle on which this rule was founded appears to have been that if land was directed to go over in one of several specified particular events, it must be taken to have been intended that it never was to go over in any other, and therefore a fee was held to pass in the first instance, from which it followed that what did pass in the second instance if the specified event or events happened must necessarily be a fee also. That the fee passed was inferred from the

(1) Willes, 138, 142.
(2) Page 136.
(3) 9 East, 1.
(4) 1 B. & C. 638.
(5) 11 East, 160.
(6) 5 M. & S. 408.
(7) 19 Beav. 225.

substituted gift. In the cases which have been decided on this principle, the first interest it is true has been a vested interest, subject to be divested, with the exception perhaps of *Robinson* v. *Grey* (1), in which case, however, there were other special circumstances.

It has been urged on the part of the Appellant in this case, that no new rule can now be laid down, no existing rule or exception extended beyond its fair limits, and that there is but one original gift, being a gift to a given class of persons living at a particular time, which might or might not consist of two generations. I quite agree that no new rule or exception is now to be created, and that no existing exception to a well-established rule is now to be extended beyond its fair limits; but though the mode of describing the gift on the part of the Appellant is in one sense accurate—that is, if you look at the actual technical vesting of the estate and nothing else—this is not in my opinion the true mode of describing or looking at the gift with the view of ascertaining whether it does or does not come within the principle of the exception to the rule which has been referred to. The will ought to be looked to with reference to the gifts—first, to the parents, and secondly, to the children of those parents. The true way of describing the gift in question is as being a previous contingent gift to the parents, with a substituted contingent gift to the children of such of the parents as might happen to die before the specified periods, and have children living at that period, those children taking their parents' share. If the words "which shall be then living" had been omitted from the gift to the parents, the authorities would have been quite conclusive; and the inquiry is whether the principle or reason on which the authorities have been founded is not just as applicable to a first contingent as to a first vested interest, there being a provision by way of substitution for each in given specified events. In *Egerton* v. *Earl Brownlow* (2), Lord *Lyndhurst*, in speaking of a contingent remainder, and with reference to the applicability to it of a condition subsequent, says: "The fallacy, if I may so speak, which has led to the forcible conversion of the words importing a condition subsequent into a condition precedent seems to be

(1) 9 East, 1.

(2) 4 H. L. C. 1, 157.

18 Jun 94-2

this—namely, that a condition subsequent is not properly applicable to the limitation of a contingent use or estate, but such a use or estate is an interest recognised by the law and not unfrequently of great value; and there is no more inconsistency in making it subject to a condition subsequent by declaring that if a certain event shall not have occurred the limitation shall determine or cease and be void, than if it were an interest vested or in possession." And in the same case (1) Lord *St. Leonards* uses these expressions: "I can have no doubt that a contingent use is a confidence, a trust, and therefore is an estate, first in equity, and then at law, but which, before the event arises, is just as capable of being defeated by a matter subsequent as any vested estate in the possession of any person." Here a contingent interest was created, and this contingent interest was to be defeated or go over in the event of the death of the person or persons contingently interested before a given period leaving issue; and if a vested interest would be held to be a fee under these circumstances, and it clearly would, according to the same *ratio decidendi*, a contingent interest would; and if the first gift is a fee, it follows that the second is.

For these reasons, I am of opinion that the order of the Court below ought to be affirmed, but it is a case in which all parties should have their costs out of the funds.

Solicitors: Messrs. *Ewbank & Partington*; Messrs. *Singleton & Tattershall.*

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(1) 4 H. L. C. 207. 18 Jur 108.

L. J. G.
1870
May 7.

13 Eq 262.

MUNNS *v.* ISLE OF WIGHT RAILWAY COMPANY.

Vendor and Purchaser—Railway Company—Unpaid Landowner—Lien—Receiver—Injunction.

A person who had sold to a railway company some land over which the railway had been made and opened, obtained a decree ordering specific performance, and declaring his lien for the balance of purchase-money. The company having become insolvent, an order was made, on the Petition of the vendor, for sale of the land and payment of the deficiency, and for an injunction restraining the company until payment from running any engine over, or otherwise using or continuing in possession of the land:—

Held (varying the order of *James*, V.C.), that an injunction was not the proper form of relief, as it would make the land useless to both parties. The order for an injunction was therefore discharged, and an order made for a receiver, with a direction to the company to give him immediate possession.

Where land purchased by a railway company is sold to enforce the vendor's lien for unpaid purchase-money, it is sold free from all claims of the public to use it as a highway.

THIS was an Appeal Petition by the *Isle of Wight Railway Company* from an order of Vice-Chancellor *James*.

On the 20th of April, 1863, the company agreed with the testator of the Plaintiffs for the purchase from him of certain land for £1250, and it was provided that on payment of £500 the company might take possession; interest to be paid on the balance of the purchase-money till the 1st of July, 1863, when the purchase was to be completed. The company paid the £500, took possession in May, 1863, and made their railway over the land.

Interest was paid on the balance up to the 20th of April, 1867, from which time no interest was paid.

In November, 1868, the Plaintiffs filed their bill praying for a declaration that the title had been accepted, and for specific performance, and also for a declaration that the Plaintiffs were entitled to a lien for the balance of the purchase-money, and that such lien might, if necessary, be enforced by sale; that in the meantime the company might be restrained by injunction from continuing in possession of the land, or that a receiver might be appointed to receive the tolls, rates, duties, and rents, and profits of the railway and lands of the company.

On the 20th of February, 1869, a decree was made declaring that the company had accepted the title, that the agreement ought to be specifically performed, and that the Plaintiffs were entitled to a lien on the land for the balance of the purchase-money and interest; and directions were given for completion of the purchase, and payment of the balance of purchase-money, with interest and costs, by the company to the Plaintiffs on the 11th of June then next, and in default of payment the Plaintiffs were to be at liberty to make such application to the Court for the purpose of enforcing their lien or otherwise as they might be advised.

On the 13th of May, 1869, the company filed a scheme of arrangement, enabling them to create debenture stock to be applied in payment of their debts, and rentcharges for payment of unpaid purchase-moneys, and in June, 1869, they asked the Plaintiffs to accept debenture stock or a rentcharge. The Plaintiffs refused to accede to this, and presented a Petition on the 19th of June, 1869, praying that notwithstanding the filing of the scheme the land might be sold, and that the company might be ordered to pay to the Plaintiffs the deficiency to arise on such sale, and to deliver up possession to the purchasers, and that in the meantime the company might be restrained from running any engine over or otherwise using or continuing in possession of or interfering with the land, or that a receiver of the rents and profits of the land might be appointed.

On the 19th of July, 1869, Vice-Chancellor *James* made an order that notwithstanding the filing of the scheme the lands in question should be sold, and the money paid into Court; and that until such sale, or the payment by the company to the Plaintiffs of principal, interest, and costs according to the decree, an injunction should be awarded to restrain the company from running any engine over, or otherwise using, or continuing in possession of, or interfering with the lands in question, with liberty to the Plaintiffs to apply as to the proceeds of the sale, or as to any deficiency to arise thereon, or in order to compel the Defendants to perform the order (1).

The company appealed.

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(1) Law Rep. 8 Eq. 653.

Mr. *Kay*, Q.C., and Mr. *Kekewich*, for the Appeal Petition:—

The authorities are against the granting an injunction of this nature. In *Cosens* v. *Bognor Railway Company* (1) the then Lords Justices differed on the point; but in *Pell* v. *Northampton and Banbury Junction Railway Company* (2) the injunction was refused, in a case very like this; and *Wing* v. *Tottenham and Hampstead Junction Railway Company* (3) agrees with that.

[The LORD JUSTICE GIFFARD:—Could there be foreclosure to enforce the lien?]

We submit not. Foreclosure in cases of equitable mortgage is granted only where the memorandum contains an agreement to give a legal mortgage. Such a thing never was heard of as turning the legal owner out of possession in a suit to enforce a lien; the remedy is by a receiver. The present case is an attempt to put the screw on the company by preventing the land from being used for the benefit of anybody. In *Rose* v. *Mid-Hants Railway Company*, before the Master of the Rolls, on the 30th of July, 1867, His Lordship said: "In a suit for specific performance, I never turn a railway company out of possession," and "I cannot allow the public use of this railway to be stopped." The case of *Bishop of Winchester* v. *Mid-Hants Railway Company* (4), is against the Plaintiffs. In a case between individuals, an injunction of this kind would not be granted to enforce the lien, and in the case of a railway company, the difference, if any, must be against the vendor, for the rights of the public are to be regarded. *Rose* v. *Watson* (5) shews how a lien of this kind is to be enforced; an injunction is inconsistent with specific performance. The case of *Earl of Jersey* v. *Briton Ferry Floating Dock Company* (6) is in our favour.

[The LORD JUSTICE GIFFARD:—Is not the question more one of form than substance? If the property is sold you will be turned out of possession.]

We submit not; for the company only holds subject to the rights of the public.

(1) Law Rep. 1 Ch. 594. 12 Jur. N.S. 738
(2) Ibid. 2 Ch. 100. 12 Jur. N.S. 397
(3) Ibid. 3 Ch. 740.
(4) Law Rep. 5 Eq. 17.
(5) 10 H. L. C. 672.
(6) Law Rep. 7 Eq. 409.

L. J. G.
1870
MUNNS
v.
ISLE OF WIGHT
RAILWAY CO.

[The LORD JUSTICE GIFFARD:—If you mean to say that the public will have a right of way over the land when it is sold, you must argue that point.]

Potts v. *Warwick and Birmingham Canal Navigation Company* (1), is in our favour.

[The LORD JUSTICE GIFFARD:—That is the case of a judgment creditor who claims through the company. Look at the case on principle. A railway company acquires land subject to the obligation of paying for it, and dedicates it to the public; the conditions of payment not being fulfilled, the land is ordered to be sold. Surely, what has to be sold is the estate which the vendor had?]

Even if that be so, a railway company is in no worse position than an individual, and this injunction cannot be sustained.

Mr. *Amphlett*, Q.C., and Mr. *Cates*, for the Plaintiffs:—

The Court will give such directions as, in the particular circumstances of the case, are necessary for the protection of the persons having the lien. The contest is one merely of words and form. If a receiver is appointed he must have actual possession for the purposes of sale. Nobody would buy if there was to be a conflict about possession.

[The LORD JUSTICE GIFFARD:—But if the receiver found the property did not sell he must come to the Court for directions as to making something out of the property. There seems an inconsistency in an injunction which makes the property useless to everybody.]

The case is not like an ordinary case of vendor and purchaser; the railway company takes the land and destroys it. The case of *Pell* v. *Northampton and Banbury Junction Railway Company* (2) does not press us, for it was an interlocutory application before decree. *Wing* v. *Tottenham and Hampstead Junction Railway Company* (3) and *Raphael* v. *Thames Valley Railway Company* (4) are utterly inconsistent with the idea of the Master of the Rolls, that the rights of the public cannot be interfered with by a person having a paramount title. *Bishop of Winchester* v. *Mid-Hants Railway Company* (1) is in favour of an injunction. If the order is supported we shall get our money; if it is reversed an endless litigation is before us.

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(1) Kay, 142.
(2) Law Rep. 2 Ch. 100. 12 Jur. NS 897
(3) Law Rep. 3 Ch. 740.
(4) Ibid. 2 Ch. 147.

Mr. *Kay*, in reply.

Sir G. M. Giffard, L. J.:—

In this case the railway company is entirely in default. The contract was entered into as long ago as the 20th of April, 1863. The railway company made a part payment of £500 under that contract, and it ought to have been completed on the 1st of July, 1863. The bill was filed in November, 1868, and a decree was made on the 20th of January, 1869, very much the ordinary vendor's decree, with liberty to apply, and the vendor does not seek to rescind the contract. Under these circumstances this Petition was presented, asking an order for sale, and an order for sale was made. I cannot have any doubt whatever but that the thing which is directed to be sold is the land freed and discharged from any conceivable claims on the part of the company, and from any conceivable claims on the part of the public as claiming through the company. That question has been considered several times by the Court, and the rule was laid down, though not carried to its ultimate results, in the case of *Wing* v. *Tottenham and Hampstead Junction Railway Company* (2). There cannot be a doubt that if a railway company contract with a person to buy land of him for the purpose of making their railway over it, they can only give to the public such rights as they have; and if their rights are subject to the rights of the vendor, the rights of the public must necessarily be subject to, and cannot be allowed to interfere with, the rights of the vendor. I can have, therefore, no doubt what it is that has to be sold, and the only difficulty I feel upon this order is, that until the sale there is an injunction, the effect of which is that no one can deal with the property, or use the property, or make any advantage from the property, until the sale actually takes place.

In the case of *Pell* v. *Northampton and Banbury Junction Railway*

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(1) Law Rep. 5 Eq. 17.

(2) Law Rep. 3 Ch. 740.

L. J. G.
1870
MUNNS
v.
ISLE OF WIGHT
RAILWAY CO.

Company (1) (although that, I agree, was on an interlocutory application before decree), both Sir *George Turner* and Lord *Cairns* expressed their opinion that there ought not to be an injunction, but that there might be a receiver; and in *Cozens* v. *Bognor Railway Company* (2) Sir *George Turner* had expressed his opinion that to appoint a receiver was the proper course. Now, when we consider the relative positions of vendor and purchaser—and I cannot see any ground why the railway company should be in a different position from that of any other insolvent purchaser in possession of the property which he has agreed to purchase and cannot pay for;—when we consider their relative positions, we see that both vendor and purchaser have an interest in the property, so that each has a a right to say that it shall not be put in such a state as that no one can use it. The fact is that, in that state of things, it ought to be so dealt with as to make it of advantage to the parties; that is, not of advantage to the purchaser exclusively, nor to the vendor exclusively, but so that if there be profit capable of being made, as distinct from the mere use of the property by the insolvent purchaser who can pay nothing, that profit ought to be made. I consider the case very much in the same light as if it had been the case of a house, of which there was an insolvent purchaser, under circumstances exactly similar to the present. In such a case I should not hesitate for one moment to appoint a receiver, and direct that receiver to be let into possession, and also direct the insolvent purchaser who was in possession to leave the house in order that it might be made of some profit to some one or other. That being so, I shall in this case discharge the order for an injunction, which I consider inconsistent with the authorities, and, in some measure, inconsistent with principle, and, instead of it, I shall direct the appointment of a receiver, and shall direct the Defendants at once to let the receiver into possession. There I shall leave the matter. That will practically give the vendors all the relief and all the advantages which they could get from the present order. As the railway company have failed in the main part of their case, although I make this variation in the order I shall direct them to pay all the costs of the Appeal. The order will be to discharge the injunction, appoint a receiver, and direct the company to let

(1) Law Rep. 2 Ch. 100. 12 Jur N.S. 897 (2) Law Rep. 1 Ch. 594. 12 Jur N.S 738

L. J. G.
1870
MUNNS
v.
ISLE OF WIGHT
RAILWAY CO.

him into possession forthwith; and if the Plaintiffs wish, I have no objection to adding to the direction for sale the words, "free from all claims of the company, and of all persons claiming through the company."

Solicitors: Mr. *Elgood*; Messrs. *Porter & Twynam*.

L. J. G.
1870
May 6, 7.

12 Eq 126–8
2 Ch D 183
— 726–8

PERRY *v.* ORIENTAL HOTELS COMPANY.

Receiver—Practice—Appeal from Choice of Receiver.

An order having been made for continuing under supervision the voluntary winding-up of a company, under which a liquidator had been appointed, an equitable mortgagee of property of the company filed a bill to enforce his security, and obtained an order for a receiver. The company proposed the liquidator as receiver, but the Judge in Chambers appointed another person, who had been proposed by the Plaintiff:—

Held, on appeal, that the liquidator, inasmuch as no personal objection was alleged against him, ought to have been appointed receiver, since the appointment of another person would cause great and unnecessary expense; and that this was a matter of principle, so that an appeal from the appointment by the Judge would be entertained.

Decision of *Stuart*, V.C., reversed.

THIS was a motion on behalf of the *Oriental Hotels Company Limited*, that an order of Vice-Chancellor *Stuart*, ordering the appointment of a receiver of certain hotels and property comprised in the Plaintiff's security, and granting an injunction to restrain the liquidator of the company from intermeddling with the property, and giving the Plaintiff liberty to apply under the winding-up of the company with reference to his security, and all proceedings under the order, might be discharged.

The company was an English company formed under the *Companies Act*, 1862, for erecting hotels in *India* and *China*, and on the route between *England* and the British settlements in those countries. The Plaintiff was a contractor, and money had become due to him from the company for the erection of an hotel at *Cairo*.

By an agreement, dated the 30th of December, 1869, made between the company and *Perry*, reciting to the effect that the company was indebted to *Perry* in £9073, for instalments under a contract for erecting an hotel at *Cairo*, the company agreed with

L. J. G.
1870
PERRY
v.
ORIENTAL
HOTELS
COMPANY.

Perry that all the property of the company at *Cairo* and *Point de Galle,* including hotels, buildings, machinery, fixtures, and furniture at each of the hotels, with the appurtenances (subject as to the hotel at *Point de Galle* to a mortgage thereon for £8000 and interest, and as to all the said property, or the greater part thereof, to debentures of the company issued, or to be issued, for a sum not exceeding £25,000 and interest thereon), should thenceforth stand charged with the repayment to *Perry* of the £9073, with interest at £6 per cent. from the 1st of September, 1869, until payment. The agreement also gave *Perry* powers of sale, and contained an undertaking by the company to give him a legal mortgage, and the company appointed the managers of the two hotels severally attorneys of the company to do all acts at *Cairo* and *Point de Galle* for making the agreement effectual in those places.

On the 16th of February, 1870, a resolution was passed for the voluntary winding-up of the company, and Mr. *Cooper* was appointed liquidator. On the 21st of February an order was made by the Master of the Rolls for continuing this winding-up under the supervision of the Court. The agreement had not been registered at *Cairo.* According to the law of *Egypt,* registration, it appeared, was necessary to give effect to dealings with land in that country. In order to such registration, it was necessary that the instrument should be produced in *Cairo* by some person on behalf of the company, but the company had omitted to send instructions for that purpose.

On the 21st of March, 1870, the Plaintiff, having obtained leave of the Court, filed his bill to enforce his charge, praying for an account of what was due to him, and, in default of payment, for a sale; and in the meantime for a receiver of the income and profits of the property, and for an injunction to restrain the company and all other persons on its behalf from intermeddling with the property.

Vice-Chancellor *Stuart,* on the 26th of March, made an order for a receiver and injunction; the appointment of the receiver to be without prejudice to prior incumbrances. On the 26th of April an order was made in Chambers appointing as receiver *S. Barrow,* who was proposed for that office by the Plaintiff, the Defendants proposing the liquidator as the proper person to be receiver.

L. J. G.
1870
PERRY
v.
ORIENTAL
HOTELS
COMPANY.

Mr. *Greene*, Q.C., and Mr. *Jackson*, for the Appeal Motion:—

No receiver ought to be appointed, for the deed under which the Plaintiff claims has not been registered in *Egypt*. Without registration it is not, according to Egyptian law, a charge on the property. The security is therefore incomplete, and it cannot be made complete after a winding-up order (*Companies Act*, 1862, ss. 151, 153). We say, therefore, that a receiver ought not to be appointed at all. But if the Court is against us on this point, the liquidator ought to be appointed receiver. The bringing in a stranger will cause great expense, and tend to destroy the business. There is no objection to the appointment of the liquidator, as he is not a party interested, but an officer of the Court.

The LORD JUSTICE GIFFARD:—I am of opinion that an order for the appointment of a receiver was rightly made, the Plaintiff having a case which ought to go to a hearing.

Mr. *Dickinson*, Q.C., Mr. *Higgins*, and Mr. *Whitehorne*, for the Plaintiff:—

The appointment of the liquidator to be receiver would be like appointing a mortgagor receiver. The Court below has exercised its discretion, and an appeal from that discretion will not be allowed: *Cookes* v. *Cookes* (1).

SIR G. M. GIFFARD, L.J.:—

2 Ch.D. 183.

The facts of the case are these: There is a winding-up order under supervision, and there is a liquidator; after that an equitable mortgagee files a bill, and asks for the appointment of a receiver to secure the mesne profits, which, if his security is valid, he is entitled to claim. His right as regards the choice of the person to be appointed receiver is only this: he has a right to have some one appointed who will manage and carry on the business properly and account duly. It has not even been suggested that Mr. *Cooper* will not manage and carry on the business properly and account properly. It has not been suggested upon any substantial ground that Mr. *Cooper*, if appointed receiver, will or can do a single

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(1) 2 D. J. & S. 526.

L. J. G.
1870
PERRY
v.
ORIENTAL
HOTELS
COMPANY.

thing in any way detrimental to the interest of the Plaintiff. To come, then, to the question of expense, Mr. *Cooper* has already been in communication with the persons abroad, is in constant communication with them, and very great additional expense would be occasioned if I were to introduce a third person as receiver, because, of course, that receiver would be entitled to his own set of expenses. Suppose a second equitable mortgagee, who, as regards a prior equitable mortgagee, would stand in the position of a mortgagor, had instituted a suit in this Court, and had obtained a receiver, and afterwards the prior equitable mortgagee were to institute a suit to obtain a receiver, could I listen for one moment to an application to have some other person appointed receiver in the place of that receiver who had been previously appointed, unless the former receiver was objectionable? Clearly not; because it would occasion a great unnecessary expense. So in this case I do not at all hesitate to say that the liquidator is the proper person to be appointed, there being no personal objection whatever to him, he being, as far as I can see, fully competent to manage and carry on the business, and it not being in his power to do any mischief whatever to the Plaintiff as regards his security. I therefore, to save expense, and treating this as a question of principle, discharge the appointment of Mr. *Barrow*, and appoint the liquidator as receiver. Mr. *Greene's* client ought to have come before the recognizances were entered into, and therefore the costs of those recognizances must be paid out of the estate. The Plaintiff's other costs will be added to his debt.

Solicitors: Messrs. *Uptons, Johnson, & Co.*; Messrs. *Lewis, Munns, & Co.*

L. J. G.
1870
May 3.

[illegible]

In re INTERNATIONAL LIFE ASSURANCE SOCIETY.

McIVER'S CLAIM.

Policy—Priority—Payment out of Property—Creditors' Representative—Costs.

The policies of a life assurance company provided that the funds and property of the company, "after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property," should alone be liable for payment of the sum assured, and that no member of the company should be liable for it beyond the amount unpaid on his shares. An order having been made for winding up the company:—

Held (affirming the decision of *Malins*, V.C.), that a sum which had become payable on a policy before the commencement of the winding-up, but had not been paid, had no priority over the claims of policyholders the moneys assured by whose policies had not become payable.

The costs of the appearance of a creditors' representative will not be allowed, except in special cases.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Malins*, holding that the sum which had become payable before the winding-up under a life policy held by the Appellants and granted by the *International Life Assurance Society*, which was being wound up, was not payable in preference to the claims of policyholders whose policies had not become payable.

By the deed of settlement of the society the policies were to be in such form as the directors thought fit, provided that there should be contained therein express words for making all sums of money payable by virtue thereof payable out of the funds and effects of the society only, and referring to the provisoes in the deed restricting the liability of the directors parties thereto and of all other members of the society to the amount of their respective shares.

The question turned on the form of policy used by the society, which provided that on due payment of the premiums, "the funds and property of the said society, according to the deed or deeds of settlement thereof (after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property), shall be subject and liable to pay" to the executors or administrators of the assured within three months after proof of his death the sum assured.

L. J. G.
1870
In re INTERNATIONAL LIFE ASSURANCE SOCIETY.
MCIVER'S CLAIM.

The policies also contained a proviso, "That no person assured by the society shall be liable to any demand against the society, and that the funds and property of the society, according to the deed or deeds of settlement thereof, after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property, shall alone be answerable for the payment of the moneys assured by this policy; and that no director of the society by whom this policy is executed, nor any other proprietor of the society, shall be responsible for the payment of or contribution towards the moneys assured by this policy, or liable to any demand against the society on any pretence whatsoever, beyond the amount of the unpaid part for the time being of his or her share or shares in the subscribed capital of the society."

The Rev. *W. McIver* insured his life with the society in 1850. He died on the 5th of May, 1868, and proof of his death was given to the society more than three months before the winding-up, which commenced in November, 1868. His executors, whose claim had been admitted, took out a summons for payment of the amount. This summons was adjourned into Court as a representative case, to have it determined whether claimants whose claims had matured before the winding-up were entitled to priority over the claims on policies which had not become payable. Vice-Chancellor *Malins* held that they had no such priority.

Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the appeal motion:—

We do not contend that the policies create a charge on the funds, but we say that by the special terms of his contract each policyholder postpones his claim to that of all policyholders whose claims are previously "payable." Our view is the only one that satisfies the plain meaning of the words. The case of *In re State Fire Insurance Company* (1) shews that there is no charge, but does not in any other respect touch the present case, for the policies there merely declared that the funds and property should alone be liable, without any exception of prior claims; so that unless the policies created charges which would rank according to date, there was no pretence for giving one priority over another.

(1) 1 D. J. & S. 634.

L. J. G.
1870

In re INTERNATIONAL LIFE ASSURANCE SOCIETY.

McIVER'S CLAIM.

If an action had been brought on one of these policies the plaintiffs must have averred that the funds were sufficient to pay; the truth of the allegation must have been tried according to the terms of the policies, and if it was shewn that policies had previously become payable to an amount sufficient to exhaust the assets, the action would fail. The rule must be the same here; the terms of the contract govern it, being a case of mere legal rights.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the official liquidator, were not called upon.

SIR G. M. GIFFARD, L.J.:—

When it was once admitted, and properly admitted, that this policy effected no charge on the funds of the society, it appeared to me that there was an end of the whole matter. It is manifest that the object of the proviso was to limit the liability of the members of the society, not to give to creditors any rights of any description. In the first place, the object of the clause of the deed of settlement which has been referred to is plain; it is, in substance, to make, by private agreement, a limited company, and, of course, that provision is the guide in granting every policy. Then each policy consists of two parts: the first is the witnessing part, which provides that if the assured shall pay the premium in every year, then "the funds and property of the society, according to the deed or deeds of settlement thereof, after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property," shall be subject and liable to pay the amount of the assurance. The second part is the proviso, which I think does not carry the matter any further. If we bear in mind that the object of the provisions as to the liability of the funds was the indemnity of the directors and shareholders against unlimited personal liability, I have no hesitation in saying that the words mean "after payment of all prior charges on the funds, and all policies previously payable, if they are charges." At the time when these provisions were framed it was doubtful whether policies of this nature were not charges, and the proviso proceeds on the footing that they might be charges, but I do not think that the clause was intended to give policies priority *inter se*, if they did not create any charge. It appears to me that there was no contract compelling the society to apply its funds in any particular mode, but simply a contract indemnifying the shareholders and directors, and, out of abundant caution, providing for any possible charges there might be on the funds, including policies, if they were charges. That being so, this appeal motion must be refused with costs.

Mr. *Phear*, for the creditors' representative, asked for his costs.

The LORD JUSTICE GIFFARD declined to give them, saying that his separate appearance was unnecessary.

Mr. *Phear* then stated an order of the Court which appointed the creditors' representative, and directed that he should be at liberty to attend all further proceedings in the winding-up as representing the creditors of the society, and that he should have the costs of such appearance out of the assets of the society. He submitted that the creditors had a distinct interest in the present case, there being no dispute that the claims were payable, the only question being one between the creditors themselves as to the order in which they were to be paid.

SIR G. M. GIFFARD, L.J.:—

As you appear under the authority of an order, I shall give you the costs of your present appearance out of the estate, but I shall discharge that order as leading to useless expense.

Mr. *Phear* observed that there was no application to discharge the order.

SIR G. M. GIFFARD, L.J.:—

But I can discharge it, and I shall do so without prejudice to any application you may make when there is any special question on which the appearance of some one to represent the creditors is desirable. On the present occasion it is perfectly unnecessary.

Solicitors: Mr. *Beddall;* Mr. *John Tucker.*

L. J. G.
1870
April 29.

In re ACCIDENTAL AND MARINE INSURANCE CORPORATION.

Ex parte BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

Winding-up — Past Members — Distribution of Contributions among the Creditors—Companies Act, 1862, *ss.* 38, 98, 133.

6 Ch 800-2-3.
7 Ch 202-3.
13 Eq 389.
6 PC 269

In the winding-up of a limited company the contributions of past members (commonly called Class B) ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors.

The order of *Stuart*, V.C., affirmed.

Aff'd nom Webb v Whiffin L R 5 H L 711

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, made in the winding-up of the *Accidental and Marine Insurance Corporation, Limited.*

The company was registered under the *Companies Act*, 1862, in August, 1865, and was now being wound up voluntarily under the supervision of the Court. The order for supervision was made on the 24th of October, 1866.

The members of the company who were on the register at the commencement of the winding-up were found unable to satisfy the liabilities of the company. The liquidators, therefore, had recourse to the past members, who had been placed on list *B.*, under the 35th section of the *Companies Act*, 1862, and contributions from them to a considerable amount were obtained.

The Appellants were the trustees of the *Briton Medical and General Life Association*, and were the holders of two debentures which were issued previously to the time when any of the members who were on the list of past members ceased to be shareholders. They had received dividends to the amount of 3*s.* in the pound in the winding-up, and their debt was thereby reduced to a balance of £722 10*s.*

The Appellants, who represented a number of other creditors in a similar position, made an application to the Vice-Chancellor to have the contributions of the past members applied in payment

L. J. G.
1870

In re
ACCIDENTAL AND MARINE INSURANCE CORPORATION.
Ex parte
BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

of their debts in priority to the creditors whose debts were contracted subsequently to the past members leaving the company. The Vice-Chancellor was of opinion that the contributions of the past members ought to be applied in payment of all the creditors of the company *pari passu*; (2) and the applicants appealed from his decision (1).

Mr. *Greene*, Q.C., and Mr. *Holl* (of the Common Law Bar), for the Appellants :—

We contend that the contributions of the past members are only applicable to satisfy the claims of creditors in respect of debts contracted while they were members. By the 7 & 8 Vict. c. 110, s. 66, past shareholders were released from liability as to debts contracted after they ceased to be shareholders. This is in accordance with the ordinary law of partnership, for an outgoing partner cannot be

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(1) The clauses of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), specially referred to in the argument were the following :—

Sect. 38. "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following, that is to say :—

"(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards, prior to the commencement of the winding-up.

"(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

"(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act."

Sect. 98. "As soon as may be after making an order for winding up a company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities."

Sect. 133. The following consequences shall ensue upon the voluntary winding-up of a company :—

"(1.) The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

(2) See WR (1870) 92: 18 WR 538

L. J. G.
1870
In re ACCIDENTAL AND MARINE INSURANCE CORPORATION. *Ex parte* BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

made liable for debts incurred subsequently to his retirement. On the other hand, an incoming partner, if he comes in under the contract that the assets and liabilities of the old partnership shall belong to the new, will be liable for the old debts. This is the principle which governs the relation of the members and creditors of joint-stock companies. The 38th section of the *Companies Act*, 1862, has not altered this relation, except that it has restricted the liability to one year instead of three years. The effect of the Vice-Chancellor's judgment is, that the past members are made to contribute to the subsequent debts as well as to the old debts, which is a direct violation of the 2nd clause of sect. 38, and the new creditors obtain more than they bargained for, which was only the security of the existing shareholders. The words in the 133rd section directing that the property of the company shall be applied "in satisfaction of its liabilities *pari passu*," simply mean in a due course of administration. The section only refers to voluntary liquidations, and can not, therefore, be meant to lay down any general rule of division.

[They referred to *Andrews' Case* (1).]

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the liquidators:—

The principles of the ordinary law of partnership have but little application to the present case. The *Companies Act*, 1862, has created a fresh law, and must be its own interpreter. The 133rd section is conclusive of the intentions of the Legislature, and is not inconsistent with the 38th. The 38th section deals with the liability of members, the 133rd with the distribution of their contributions. The 38th section does not say that the past members are not to contribute to any subsequent debts, but that they are not to be made contributories "in respect of" such debts. But if they are made contributories in respect of the old debts, they are liable to the full extent of their shares, and their contributions become part of the assets of the company, and must be applied *pari passu* among all the creditors. If the Appellants' construction is correct, the contributions of list *A.* would go among all the creditors, and the contributions of list *B.* among the old creditors only, which would give a most unreasonable preference to the old creditors, and would, moreover, necessitate taking a fresh account for each debt.

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(1) Law Rep. 3 Ch. 161.

Mr. *Holl*, in reply.

Sir G. M. Giffard, L.J.:—

This is, I believe, the first case in which it has become necessary for the Court to decide the exact effect of the 38th section of the Act of 1862 with reference to the rights of creditors as regards the contributions of past members, and it was for that reason that I desired to hear it argued fully. But I confess I have never felt, and do not now feel, any difficulty upon the construction of the clause. Before we go to the Act of Parliament itself, I may observe that these companies are entirely the creation of an Act of Parliament. They are corporations of a particular character, and must depend entirely upon the effect of the Acts of Parliament by which they are created. Any person who contracts with such a company does not contract with the shareholders themselves, and he cannot touch a shareholder except there be a winding-up order of the Court; but his contract is with the company, and the company is his debtor, and he is the creditor of the company.

That being so, the first thing to look at is the terms of the Act of Parliament with reference to the distribution of the assets of the company. There are only two sections of the Act which are important as bearing upon this subject. The one is the 98th section, referring to cases where there is a compulsory winding-up, and the other is the 133rd, referring to cases where there is a voluntary winding-up. It certainly could not be inferred from the 98th section that any ordinary set of creditors were to have any preference or priority over the others, or that there was to be any such rule as that the debts of certain creditors were to give them preferential rights:—[His Lordship read the 98th and 133rd sections.] Now, I quite agree that if there were something clear and specific in the 38th section, saying that certain creditors should have prior rights, and that there should be certain priorities, there is nothing in those clauses which would countervail those rights. But we necessarily start with this, that the Act of Parliament clearly contemplates the ordinary application of assets as between

L. J. G.
1870
In re ACCIDENTAL AND MARINE INSURANCE CORPORATION.
Ex parte BRITON MEDICAL AND GENERAL LIFE ASSOCIATION.

the creditors and the company. That being so, let us see what the object of the 38th section is. It has reference in the first place to the liability of members, and its object unquestionably is to settle what shall be the liability of members, and I think the liability of members very much *inter se*, regard, however, being had to what creditors there may be who have claims on the company. The section commences in this way:—[His Lordship read the introductory clause of the section, and the 1st and 3rd *placita*, and continued:—] Here are two artificial rules introduced, from which we may see at once that any rule applying to ordinary partnerships has no application whatever to a company formed under this Act. Then we come to the 2nd *placitum*, which gives rise to the question before me; and I have no hesitation in saying that the object of that *placitum* is merely to arrive at a measure by which you may ascertain the liability of past members, and it lays down this rule—namely, that past members shall not be liable in respect of debts contracted after they have ceased to have any interest in the company, and, by consequence, any control in any shape or form over what the company may do. There is not a syllable in the clause affecting the rights of creditors, or varying the rights of creditors, but the clause is simply this:—"No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member." I do not think that can be taken by itself; it must be taken in connection with the whole context, and if you take it in connection with the context, and say that no past member shall be liable to contribute to the assets of the company to an amount more than sufficient to answer the past debts, you arrive clearly at what was pointed out by the Act of Parliament.

On the other hand, supposing there was any such right as is now insisted upon by the Appellants, the difficulties that would arise would be endless, because each creditor, according to the date at which the members of the company might happen to retire, would have separate and distinct rights. That alone would be reason enough for me to say that, unless you find something in the Act of Parliament which clearly, in the event of a winding-up, gives that right to a creditor, no such right exists. Looking at the 98th and

133rd sections of the Act, and seeing that the 38th section has reference only to the liability of members, that partnerships of this description, which may be more properly termed *quasi* corporations, are entirely artificial in their construction, and that, in point of fact, the past members' liability is entirely an artificial liability, and introduced much more for the purpose of preventing persons quite at the last moment leaving a company, and thereby getting rid of their liability, than for any other purpose, I think I should be putting a construction on the Act which was not intended, which the words would not warrant, which would lead to great inconvenience, and which would be contrary to the whole spirit of the Act, if I were to decide in favour of the Appellants. That being so, this appeal motion will be refused.

Solicitors for the Appellants: Messrs. *Deane & Chubb.*
Solicitors for the Respondents: Messrs. *Lewis, Munns, & Co.*

In re OXFORD AND CANTERBURY HALL COMPANY.

L. J. G.
1870
April 29.

Company—Winding-up—Secured Creditor—Proof by Mortgagee after Contract for Sale of mortgaged Property—Form of Order.

Mortgagees of real estate of a limited company which had been ordered to be wound up contracted to sell part of their security under their power of sale. The deposit was paid, but the contract was not completed. The mortgagees then claimed to prove in the winding-up for the whole amount of their debt and costs. Afterwards they made a fresh contract for the sale of the property, the deposit being retained as part of the new purchase-money. It being uncertain whether the contract would ever be completed and the rest of the purchase-money paid, the Court made an order that the proof should be admitted for the whole amount of the debt less the amount of the purchase-money mentioned in the contract, without prejudice to the right of either party to increase or diminish the proof, and to the right of the mortgagees for further proof in respect of costs, charges, and expenses.

The decision of *James*, V.C., affirmed.

THIS was an appeal from an order made by Vice-Chancellor *James* in the winding-up of the *Oxford and Canterbury Hall Company, Limited.*

By an indenture of mortgage dated the 3rd of July, 1867, certain premises comprised in leases in the deed recited, being the *Oxford*

L. J. G.
1870
In re OXFORD AND CANTERBURY HALL COMPANY.

Music Hall, Oxford Street, and the *Canterbury Music Hall, Lambeth*, were demised for the residues of the respective terms, less one day, to the trustees of a banking company, by way of mortgage, to secure £11,000 and interest. The power of sale was in the ordinary form, and contained the words "with power to buy in, rescind, or vary any contract for sale, and resell the same, without being responsible for any loss occasioned thereby."

On the 7th of May, 1868, the *Hall Company* was ordered to be wound up; and on the 30th of June the official liquidator issued an advertisement requiring creditors to send in their claims on or before the 17th of July, 1868.

Soon after the date of the winding-up order, the bank put the property up for sale under the power, but got no bidders; and on the 9th of January, 1869, they entered into an agreement with *Morris Robert Syers* for the sale of the halls to him for £8500—the purchase to be completed on or before the 4th of March following. He paid a deposit of £1000.

On the 12th of January, 1869, the solicitor of the bank informed the official liquidator of the fact of the last-mentioned agreement.

On the 4th of March the remainder of the purchase-money was not forthcoming, and the contract was not completed.

On the 24th of March, 1869, the bank, by their solicitors, wrote to the official liquidator, claiming to be admitted as creditors for £11,652 8*s*., being £11,000 and interest. Notice to prove was afterwards sent, and an affidavit in support was filed on the 26th of April.

On the 29th of June a new contract for sale for £9025, of which the £1000 deposit was to form part, was entered into. This purchase had not been completed.

On the 2nd of July, 1869, on the application of the mortgagees, it was ordered that the official liquidator be at liberty to deliver possession to the mortgagees within three days of service of the order, which was accordingly done.

On the 31st of July, 1869, the claim of the bank to prove for the debt of £11,652 8*s*. was heard; and His Honour, on that occasion, made an order that the proof of the debt of the bank be allowed, "with a deduction only of the net amount realized by the sale of the *Oxford Music Hall* and premises, less the costs, charges, and

L. J. G.
1870
In re
OXFORD AND CANTERBURY HALL COMPANY.

expenses properly incurred by the *Banking Company* as mortgagees of the same premises" (1).

When the matter again came forward in Chambers, the bank claimed to deduct only the sum of £1000, while the official liquidator contended that the whole of the purchase-money, less an estimated sum for costs, charges, and expenses, ought to be deducted from the mortgagee's proof. A summons was accordingly taken out to settle the question, which was adjourned into Court, and the Vice-Chancellor made an order that the proof be admitted for the amount (£11,652 8*s*.), less the amount of purchase-money (£9025) mentioned in the last contract, without prejudice to the right of either party to increase or diminish the proof according as the property should realize less or more than that contract price; or to the right of the mortgagees to further proof in respect of costs, charges, and expenses properly incurred. The costs of all parties of the application to come out of the estate. (6)

From this order the official liquidator appealed.

Mr. *Eddis*, Q.C., and Mr. *Higgins*, for the Appellant:—

The bank having sold this property are in the same position as if they had foreclosed. Our right as mortgagors is to pay the debt and have a reconveyance of the estate: *Walker* v. *Jones* (2). Here the mortgagees have put it out of their power to give us a reconveyance. They have chosen their own remedy, and must take the estate for better for worse. They cannot now return to their old character of mortgagees: *Lockhart* v. *Hardy* (3). The conduct of the mortgagees has placed us in this difficulty: that until their proof is admitted the assets cannot be distributed, and all the proceedings in the winding-up are suspended. This case resembles *Ex parte Maxoudoff* (4) rather than *Kellock's Case* (5).

Mr. *Kay*, Q.C., and Mr. *Waller*, for the *Banking Company*, were not called on.

SIR G. M. GIFFARD, L.J.:—

It does not appear to me that there is any reason for differing

(1) Law Rep. 8 Eq. 691.
(2) Ibid. 1 P. C. 50, 61.
(3) 9 Beav. 349.
(4) Law Rep. 6 Eq. 582.
12 Jur. N.S. 381 (5) Law Rep. 3 Ch. 769.

(6) See W.N. (1870) 82.

L. J. G.
1870
In re Oxford and Canterbury Hall Company.

from the opinion of the Vice-Chancellor, and I consider that the decisions of the Vice-Chancellor on the former occasion (1) and on the application in which the present appeal has been brought are consistent with one another. There is no evidence of any impropriety of conduct on the part of the mortgagees. The only question is, what are the rights of the parties? I do not think that *Kellock's Case* (2) has any bearing upon this case. All that was decided there was that the rule in Bankruptcy does not apply in cases of winding-up, but that a creditor is entitled to prove for all that is due at the time when the claim is sent in without regard to his securities. In the present case the Vice-Chancellor by his former order decided that the mortgagees must deduct from their proof the sum for which they contracted to sell a portion of their property; and he has now decided that they shall have leave to add to their proof if the price is not realized. The case of *Walker* v. *Jones* (3) is not inconsistent with this decision; for it is possible that the contract may go off, and then the mortgagees will be remitted to their original rights, in which case they would be entitled to prove for the whole debt. I think, therefore, that the order is correct; but there must be no unreasonable delay. The appeal will be dismissed with costs.

Solicitors for the Liquidator: Messrs. *Mercer & Mercer.*

Solicitors for the *Banking Company:* Messrs. *Stevens, Wilkinson, & Harries.*

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(1) Law Rep. 8 Eq. 691.
(2) Law Rep. 3 Ch. 769.
(3) Law Rep. 1 P. C. 50. 12 Jur nS 381

In re ANGLO-ROMANO WATER COMPANY.

WRIGHT'S CASE.

L. J. G.
1870
April 30.

9/36

6 Ch 183

12 Eq 509

Liquidator—Accounts—Winding-up under Supervision—Sanction of Court—Companies Act, 1862, *ss.* 139, 151, 160.

The *A. R. Company*, in *England*, passed a resolution for voluntary winding-up, with a view to disposing of its undertaking to the *A. P. Company*, to be formed in *Rome* for that purpose. An order for continuing the voluntary winding-up under the supervision of the Court was shortly afterwards made. Disputes having arisen, the liquidator entered into an arrangement with the *A. P. Company*, under which each fully paid-up shareholder of the *A. R. Company* was entitled to receive an equal number of shares of the same amount in the *A. P. Company*, and a number of other shares in the *A. P. Company* were given to the liquidator to be disposed of for the benefit of the *A. R. Company*. *W.*, a holder of twenty paid-up £20 shares in the *A. R. Company*, received twenty shares in the *A. P. Company* for his shares, and also took and paid for (at par) five of the *A. P.* shares which were at the disposal of the liquidator. This was done under an agreement by which the liquidator contended that *W.* ceased to have any interest in the *A. R. Company*, and accordingly removed his name from the list of contributories. These transactions were all sanctioned by general meetings of contributories, but not by the Court. *W.* afterwards took out a summons for the liquidator to bring in his account, which was ordered by the Master of the Rolls:—

Held, that *W.* had not agreed to give up his interest in the company, and had a *locus standi;* but

Semble, if the arrangements had involved an agreement by him to give up all interest in the company, he would have had no *locus standi*, for that, under ss. 139, 151, and 160 of the *Companies Act*, 1862, the liquidator, though the winding-up was under supervision, had power to enter into the arrangement, with the sanction of meetings of the contributories, and that the sanction of the Court was not necessary, the Court not having given any directions restricting the exercise of his powers:—

9/51

Held, that the liquidator had properly been ordered to bring in his account, though the interest of the applicant was exceedingly small.

Order of the Master of the Rolls affirmed.

THIS was a motion by the liquidator of the *Anglo-Romano Water Company, Limited*, to discharge an order of the Master of the Rolls directing him to bring in his account.

The company was formed for the purpose of supplying *Rome* with water, and purchased a concession, granted by the *Pope*, for constructing waterworks within his territories. By far the greater

L. J. G.
1870
WRIGHT'S CASE.

part of the shares allotted were allotted to persons resident in *Rome*.

On the 7th of December, 1867, resolutions were passed that the company should be wound up voluntarily, with a view to its ultimate dissolution and sale to a new company to be formed according to Roman law, and to be intituled "*Société Anonyme de l'Acqua Marcia*," and that the winding-up of the company should commence immediately from the time of the resolutions being fully confirmed; that Mr. *Bennett* should be appointed liquidator, and that the liquidator should be authorized and empowered to sell and transfer all the business, goodwill, concessions, and assets of the company, subject to the liabilities thereof, upon the terms of a certain circular and contract referred to in the resolutions.

The resolutions were duly confirmed on the 18th of January; and on the 25th of January, 1868, an order was made for continuing the voluntary winding-up under the supervision of the Court.

The Roman company was formed, and changed its name to the *Acqua Pia Company*. Difficulties and disputes soon arose. The Roman managers of the *Acqua Pia Company* insisted that the effect of the resolutions was to convert the English company into a Roman one, so as to invest the *Acqua Pia Company* with all the rights of the *Anglo-Romano Company* as against its shareholders, and threatened to forfeit the shares of the English shareholders for nonpayment of calls. On the 8th of April a meeting, in *London*, of the *Anglo-Romano* shareholders passed a resolution that the liquidator should make a call of £7 per share, and that he and his solicitor should go to *Rome* to protect the interest of the shareholders as they best could. The liquidator made a call accordingly, and, after having received a considerable sum in respect of it, went over to *Rome*.

Ultimately, on the 11th of May, 1869, an agreement was entered into between the managing body of the *Acqua Pia Company* and the liquidator, to the effect that the property of the *Anglo-Romano Company* should be made over to the *Acqua Pia Company*; that the *Anglo-Romano Company* should pay to the *Acqua Pia Company* £6239 (being the amount of calls on shares held in *England*, except calls of which the *Acqua Pia* had had the benefit); that the

L. J. G.
1870
WRIGHT'S CASE.

Acqua Pia Company should hand to the liquidator a number of paid-up *Acqua Pia* shares equal to that of the *Anglo-Romano* shares held by English shareholders, and to be exchanged for them. It was also agreed that the *Acqua Pia Company* should give to the liquidator fifteen fully paid-up *Acqua Pia* shares, to be disposed of by him for the benefit of the *Anglo-Romano Company*, and, by an arrangement with another party, some further paid-up shares in the *Acqua Pia* were given to the liquidator for the same purpose. The shares in each company were £20 shares.

On the 31st of May, 1869, a meeting of shareholders of the *Anglo-Romano Company* in *London* passed a resolution approving of the above arrangement. Some of the English shareholders had not paid their calls, and could not be found, and, in order to make up what was necessary to perform the agreement, the English shareholders in the *Anglo-Romano* were invited by the liquidator to take up the shares in the *Acqua Pia* which were at the disposal of the liquidator, and forms of application were sent to them, which were as follows:—

"To the *Anglo-Romano Water Company, Limited,* and Mr. *F. Bennett*, liquidator.

"I hereby apply to you, and subscribe for and agree to take, at par, shares in the Roman company *Acqua Pia,* to the number set opposite to my signature at foot."

Wright, who was on the list of contributories of the *Anglo-Romano Company* for twenty shares, subscribed this form of application for six shares. He had fully paid up his twenty shares in the course of the liquidation.

The liquidator deposed as follows as to the arrangement between him and *Wright*:—

"Under date the 13th of July, 1869, the said *W. Wright,* in respect of his said subscription for six shares, took five of the same, and paid to me for the same £100, and at the same time he and myself entered into an oral agreement, under which, in consideration of my then acquiescing in his taking the said five shares in lieu of the said six, he contracted with me that, in case it should become necessary for my monetary arrangements in the matter of the liquidation, he would take two more of the said *Acqua Pia*

L. J. G.
1870
WRIGHT'S CASE.

shares at par, making up a total of seven, in consideration of my also agreeing with him that in respect of the said twenty shares so as aforesaid mentioned in the list of contributories, and fully paid up, I would take and accept the same, and hand to him the certificates for twenty shares in the said *Acqua Pia*." "Between the said 8th of April, 1869, and the 16th of November, 1869, the said *W. Wright* handed me the certificate for his twenty shares, and on the said 16th of November I handed him in exchange therefor, and in fulfilment on my part of the arrangement and agreements aforesaid, twenty shares in the Roman company *Acqua Pia*, and under date the said 16th of November I received from the said *W. Wright* a receipt for the twenty shares in the *Acqua Pia Company*."

On the 28th of January, 1870, the liquidator wrote to *Wright*, asking him to take the two additional *Acqua Pia* shares. *Wright* wrote back in reply that he could not afford to do so, and considered that he had already taken his fair proportion. On the 31st of January the liquidator wrote again, pressing him to take the shares. To this letter no answer was returned, but on the 5th of February *Wright*, by the solicitors who until a very short time previously had been the solicitors of the liquidator, took out a summons calling upon the liquidator, within seven days, to bring in and pass his account of receipts and payments.

On the 8th of February, 1870, the liquidator erased the name of *Wright* from the list of contributories, and sent him notice of having done so.

On the 4th of March, 1870, a meeting of contributories was held, at which resolutions were passed confirming the agreements entered into by the liquidator with several contributories, and, among others, that with *Wright*, and also approving and confirming the erasure of *Wright's* name from the list of contributories. It was further resolved that the course pursued by the liquidator in resisting *Wright's* summons should be confirmed, and that the liquidator should be requested and authorized to continue resistance to applications, by whomsoever made, requiring him to incur the expense of passing his accounts in Chancery.

On the 21st of March, 1870, the summons having been adjourned into Court, the Master of the Rolls made the order under appeal.

L. J. G.
1870
WRIGHT'S CASE.

Sir *R. Baggallay*, Q.C., and Mr. *Langley*, for the liquidator:—

We say that *Wright* is not a contributory, but even if he is, this is not a case where the Court will direct the liquidator to bring in his accounts. Sect. 161 of the *Companies Act* authorizes the transaction which took place with the *Acqua Pia Company*, and it has been confirmed by general meetings, and so have the dealings with *Wright*. *Wright* therefore has been paid off, and has no further interest in the company. But supposing he had, the liquidation is nearly at an end, and to have an account brought in before its completion is only causing useless expense. The *Companies Act*, 1862, sect. 142, provides for an account being rendered to a general meeting when the winding-up is completed.

Mr. *Jessel*, Q.C., and Mr. *Higgins*, for *Wright*:—

The arrangements are not valid under sect. 161, for that section applies only to the case of a company which is being wound up altogether voluntarily. Neither does sect. 160 help the Appellant, for compromises require the sanction of the Court unless the winding-up is altogether voluntary. By sect. 131, transfers without the sanction of the liquidators are void, and any alteration in the status of members is void. Here there was no transfer at all. The 151st section preserves the powers of the liquidators where a supervision order is made, but their liabilities are altered; they have to account to the Court instead of to a meeting, and that an account should be ordered is a matter of course. As to the status of *Wright*, he was a contributory, and his status cannot be altered except by order of the Court. He therefore is a contributory still, and can call for an account. The meeting of the 4th of March, 1870, had no power to determine that accounts should not be rendered at present.

Sir *R. Baggallay*, in reply:—

Sect. 139 provides for the liquidator doing certain things with the sanction of a general meeting. Sect. 160 does not necessarily conflict with it. Sect. 151 preserves the powers of the liquidators when a supervision order is made, but enables the Court to restrict them; and bearing this in mind, sect. 160 must be taken as cumulative, not as cutting down sect. 139. The

L. J. G.
1870
WRIGHT'S CASE.

agreement with *Wright*, therefore, might be made, and the Court will not allow him to say it was *ultrà vires* when he has taken the benefit of it. He does not come asking to set it aside, but asks the Court to ignore it.

SIR G. M. GIFFARD, L.J.:—

The first question to be considered in this case is whether the applicant in the Court below was or was not a contributory. If he was not a contributory at the time when he made his application, he cannot be entitled to call for any account, or to interfere in any way.

For the purpose of determining this question, we must first consider the agreement between the *Anglo-Romano Water Company* and the *Acqua Pia Company*. The liquidator of the *Anglo-Romano Company* agreed to make over to the *Acqua Pia Company* the property of the *Anglo-Romano Company*, including whatever right they might have in respect of the concession, and to pay to the *Acqua Pia Company* certain sums of money; and then the *Acqua Pia Company* agreed to hand over shares in the *Acqua Pia Company* to the liquidator, to one of which shares each shareholder in the *Anglo-Romano Company* would be entitled in exchange for the certificate of each fully paid-up share that he held. That being the state of things, Mr. *Wright*, in respect of his twenty shares in the *Anglo-Romano Company* which he had fully paid up, had a right, provided this agreement was carried out, to receive twenty shares in the *Acqua Pia Company*.

The liquidator then states that an agreement was made between himself and *Wright*, as to which I need only refer to two paragraphs of his affidavit:—[His Lordship read the two passages of the liquidator's evidence which are set out above.]

Now, it must be observed that *Wright* had at this time paid up everything for which he could be called upon, and was under no liability in reference to his twenty shares in the *Anglo-Romano Company*. That being so, I am of opinion that this arrangement did not alter his position with reference to the *Anglo-Romano Company*. It certainly cannot have been the intention of the parties that he should give up for the individual benefit of the liquidator any beneficial interest that he had, nor was it competent to the liquidator to stipulate for any such advantage, and it certainly was not their intention that Mr. *Wright* should give up such interest for the benefit of the other shareholders. The substance of the arrangement is nothing more than this, that Mr. *Wright* agreed to take the five shares at a price which was something more than what could be got in the market for them, and should take two other shares if required; but there was no contract by him to give up any beneficial interest he might have in the assets. It follows that Mr. *Wright* is a contributory, and if he is a contributory he has a *locus standi* to come forward on summons and ask the liquidator to bring in his accounts.

In coming to that conclusion, I by no means adopt the construction of the Act of Parliament which has been insisted upon on the part of the Respondent. I think that the construction contended for by Sir *Richard Baggallay* is the true one, and that by it the several clauses may be all made consistent. I think that it is competent to a liquidator, though the liquidation be under supervision, to enter into arrangements of this nature with the sanction of a meeting without the sanction of the Court, unless the Court has directed that he shall not do so without its sanction. My decision rests upon this, that assuming the whole transaction to be binding and not *ultrà vires, Wright* never contracted to give up, and the liquidator never contracted to take from him, any beneficial interest which he might have in the assets of the company.

Holding then, as I do, that *Wright* is a contributory, and has a *locus standi*, the question remains whether an account ought under the circumstances to be directed. I cannot help saying that of all accounting parties liquidators ought to be the most ready to render an account, and I think that, as a general rule, in an ordinary case a liquidator is not justified in resisting a summons simply calling upon him to bring in an account. After the account is brought in the Court can determine the extent to which that account shall be gone into, and the mode in which it shall be dealt with, so as to do justice between the parties. I therefore affirm the order of the Master of the Rolls. I must however say, that if there is a case in which I should desire to refuse the account, it is the present, for it is plain that nothing substantial can be coming to the applicant; it being hardly conceivable that he can have so

L. J. G.
1870
WRIGHT'S CASE.

much as £5 to receive. It is impossible to help thinking that the liquidator having changed his solicitors has brought about this application. In an ordinary case I should have dismissed the appeal with costs, but considering the circumstances under which the application was made, and the small interest of the person who made it, I shall direct that there shall be no costs of the appeal on either side, unless it is found that there is a surplus of at least £300 divisible among the shareholders; in which case the Appellant must pay the costs, and must have no costs of taking the account.

Solicitors: Messrs. *Mercer & Mercer;* Messrs. *Flux, Argles, & Rawlins.*

L. J. G.
1870
May 3, 4.

In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

ZULUETA'S CLAIM.

Company—Power of Directors—Ultrà vires—Power to buy up Shares—Articles of Association—Notice.

7 Ch 165 n.
166, 167
8 Ch 1147
4 [illegible] 655
17 Ch D. 819
92

Unless the memorandum and articles of association of a company contain in plain terms an express power enabling the company to purchase their own shares, such purchase is *ultrà vires*, although the company may be empowered to deal in shares of joint-stock companies generally.

Where, therefore, the broker of a banking company, acting under the instructions of the directors, bought shares in the company on behalf of the company, and was credited with the price paid by him for the shares in his banking account kept with the company, and the company was afterwards wound up:—

Held (reversing the decision of the Master of the Rolls), that the broker was not entitled to prove against the company for so much of the balance due to him as represented the price of the shares.

And *semble*, if the price of the shares had been actually paid to the broker by the directors, he would have been liable to refund it.

THIS was an appeal from an order of the Master of the Rolls, made in the winding-up of the *London, Hamburg, and Continental Exchange Bank, Limited* (1).

The memorandum of association thus described the objects for which the company was established:—"The objects for which the

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(1) Law Rep. 9 Eq. 270.

L. J. G.
1870
In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.
ZULUETA'S CLAIM.

company is established are the transaction of every kind of banking and exchange business in the *United Kingdom*, and on the Continent of *Europe* generally, including therein the receiving of deposits of money whether at interest or otherwise, the advancing and lending of money on real, personal, or mixed securities, on cash, credit, or other accounts, on policies, bonds, debentures, bills of exchange, promissory notes, letters of credit, or other obligations, the discounting bills of exchange, promissory notes, or other obligations, the advancing of money on the deposit of title-deeds, goods, wares, and merchandise, bills of sale, and bills of lading, delivery orders, warehousemen's or wharfingers' certificates, and notes, dock warrants, or other mercantile *indicia*, symbols, or tokens, bullion, Government or public stocks, or funds, whether British, colonial, or foreign, exchequer or navy bills, bank and *East India* stock, and shares of bankers and of banking companies, of insurance companies, of railway, canal, gas, and water companies, and in general of all other joint-stock companies, corporations, associations, and other undertakings of whatever nature or description, whether British, colonial, or foreign, produce of every description, both home and foreign, materials of any kind, whether raw or manufactured, and whether home or foreign; and on any other property, funds, and effects of whatever kind or description, the making of purchases, investments, sales, or any other dealings, in any of the above-named articles or securities, and the doing of all matters and things which may appear to the company to be incidental or conducive to those objects."

The 37th clause of the articles of association provided that any share which was forfeited or surrendered might be reissued.

The 42nd clause gave power to the directors to accept the surrender and forfeiture of any shares from or by any member desirous of surrendering and forfeiting them on such terms as they might think fit.

The 85th clause was as follows :—

"The business of the company shall be managed by the board, who, in addition to the powers and authorities by the statutes or by these presents expressly conferred upon them, may exercise all such powers, give all such consents, make all such arrangements, and generally do all such acts and things as are or shall be by the statutes and these presents directed or authorized to be exercised, given, made, or done by the company, and are not thereby expressly directed to be exercised, given, made, or done, by the company in meeting; but subject, nevertheless, to the provisions of the statutes, and of these presents, and subject also to such (if any) regulations as are from time to time prescribed by the company in meeting. But no regulation made by the company in meeting shall invalidate any prior act of the board which would have been valid if the regulation had not been made."

The 98th clause contained the following provision (sub-section 7): "The board may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, and in such manner, and upon such terms and conditions, and in all respects as they think fit, any of the property of the company, and may accept payment or satisfaction for any property disposed of in fully paid-up shares or other shares, or partly in shares and partly in cash, or in such other manner as the directors may deem expedient."

In November, 1864, the directors being desirous of keeping up the price of the shares in the bank, resolved to purchase shares in the market. No entry of this resolution was made in the Minute Book, but Mr. *Henry*, the broker of the bank, was called into the board-room, and, as stated in evidence by one of the directors, he was directed to purchase a round number of shares, the arrangement being that a certain portion of that round number were to be purchased by the bank, and other portions by some of the directors then present; and it appeared from Mr. *Henry's* examination, that he understood at the time the effect of the arrangement. In compliance with these instructions, Mr. *Henry* bought 175 shares at the average price of £11 4*s.* 1*d.*, and paid for these shares in the first instance out of his own money. Subsequently, sixty-two of these shares were transferred to the directors of the company or their friends, who repaid *Henry* the price he had paid for them; and the remaining 113 were transferred first into the name of one of the clerks of the bank, and then into the name of one *Marshall*, who had no beneficial interest in the shares, but consented to have them placed in his name as a trustee for the bank, upon being requested by one of the directors so to do. After the 113 shares had been thus transferred to *Marshall*, the secretary

L. J. G.
1870
In re
LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.
ZULUETA'S CLAIM.

of the bank delivered to *Henry* a ticket directing the cashier to credit the account which *Henry* kept at the bank with £1343 11*s.* 5*d.*, being the amount paid by him for the 113 shares. The account, which at this time shewed a balance of £19,000 due to *Henry*, was accordingly credited with this amount, and *Henry* afterwards drew on the account, and was allowed interest on the balances from time to time remaining in the hands of the bank. The company was afterwards ordered to be wound up, and at the commencement of the winding-up a considerable balance appeared by that account to be due from that company to *Henry*.

Messrs. *Zulueta* employed *Henry* as their broker, and placed large sums of money in his hands for investment. A considerable portion of these sums was lent by *Henry* to the bank, and they had obtained an order in the winding-up giving them liberty to prove in the name of *Henry* for the balance appearing to be due to *Henry* on his account with the bank. The question on this adjourned summons was whether the above balance ought not to be reduced by the sum of £1343 11*s.* 5*d.*, credited to *Henry*, as above mentioned, it being alleged by the official liquidator that the purchase of shares of the bank on behalf of the bank was *ultrà vires.*

Of the shares transferred to *Marshall*, fifty remained standing in his name at the commencement of the winding-up, the rest having been transferred to various holders. *Marshall* was placed on the list of contributories in respect of these fifty shares.

The Master of the Rolls was of opinion that, assuming that the act of the directors was *ultrà vires*, the transaction was completed by carrying the amount of the purchase-money to *Henry's* credit, and that the only remedy of the shareholders was against the directors personally. He therefore allowed the claim, and the official liquidator appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, for the Appellant:—

The investment of the money of the company in their own shares was not authorized either by the memorandum or articles of association. A mere power to deal in shares would not authorize such a transaction. Mr. *Henry* must be taken to have known the

L. J. G.
1870
In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.
ZULUETA'S CLAIM.

contents of these documents, and as a broker and man of business he must also have known that it was entirely beyond the ordinary course of business of such companies, and contrary to the rules of the *Stock Exchange: Ernest* v. *Nicholls* (1); *Joint Stock Discount Company* v. *Brown* (2); *Royal Bank of India's Case* (3). The Master of the Rolls treated the act of giving credit to *Henry* as equivalent to actual payment; but it was not so, the transaction was still *in fieri*. And even if there had been actual payment to *Henry*, the money might have been recovered from him in the same manner as if it had been trust-money: *Ernest* v. *Croysdill* (4); *Bryson* v. *Warwick and Birmingham Canal Company* (5).

Mr. *Jessel*, Q.C., and Mr. *Haynes*, for Messrs. *Zulueta*:—

The memorandum and articles gave power to the company to deal in shares, and there was nothing to restrict them to purchasing shares in other companies. The 85th and 98th clauses of the articles give the widest discretion to the directors, and the 37th and 42nd clauses, with respect to the forfeiture and surrender of shares, and reissuing those which are forfeited or surrendered, raise a presumption in favour of a power of purchasing shares. For what is the difference between inducing a person to surrender shares, and purchasing them from him in the market? In the former case relating to the same company, *London, Hamburg, and Continental Exchange Bank* v. *Henry* (6), the Master of the Rolls appears to have thought that such a transaction as this might be supported. At all events it was a question on which a stranger might have been misled by the articles. Mr. *Henry* was simply acting as broker of the bank, and it was not for him to decide whether or not his employers were acting *ultrà vires: Simpson* v. *Westminster Palace Hotel Company* (7). But however this might have been, if the transaction was still incomplete, the money cannot now be recovered, after it has been paid, for the act of giving credit to *Henry* for the amount was equivalent to payment. If the shareholders wish to impeach the transaction, the proper course would be to file a bill; it cannot be properly done in such a proceeding as the present.

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(1) 6 H. L. C. 401. 3 Jur N.S. 919
(2) Law Rep. 3 Eq. 139; Ibid. 8 Eq. 381.
(3) Ibid. 4 Ch. 252.
(4) 2 D. F. & J. 175.
(5) 4 D. M. & G. 711. 18 Jur 4
(6) Law Rep. 7 Eq. 334.
(7) 8 H. L. C. 712. 6 Jur N.S. 985

(2) S.C. 12 Jur N.S. 699

SIR G. M. GIFFARD, L.J.:—

I do not think it would be right to say, as has been argued in this case, that a bill ought to be filed or any proceeding of that kind taken, for I have before me all the materials that are necessary for the purpose of disposing of it.

The case divides itself into two parts, and the first question is whether, as between the bank and Mr. *Henry*, the whole of the transaction was a totally void transaction; and the second part of the case depends upon what has since taken place between the directors of the bank and Mr. *Henry*, which may or may not amount to confirmation.

Let me first consider whether the transaction is void between Mr. *Henry* and the bank. The matter is very fully detailed by Mr. *Henry* in his cross-examination; he says he went into the board-room, that the order was given to him to buy shares for the purpose of supporting the market, and that the amount of the shares was left very much to his discretion; that he did buy shares, that he charged the bank with them up to December, and that in December the purchase of the shares was concluded; and that there was then due from him to the bank about £1300. It is not material to state the case further than that for the purpose of determining whether this transaction was or not void as between the bank and Mr. *Henry*. Of course, if this had been a transaction in any shape within the ordinary course of the business of the company, which an ordinary person going to the company would have supposed to be within the ordinary course of their business, I should be the last to say it was a transaction that could not be supported. Again, if by any reasonable construction of the articles any one could come to the conclusion that this was a transaction authorized by those articles, I should be the last to say it was a transaction that ought not to stand. In my opinion it is a case outside the ordinary course of the business of this company, and clearly and distinctly a transaction in no sense authorized by the articles.

It was argued on the part of the Respondent, in the first place,

L. J. G.
1870
In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.
ZULUETA'S CLAIM.

that Lord *Romilly*, in the case of the *London, Hamburg, and Continental Exchange Bank* v. *Henry* (1), had expressed an opinion that a transaction such as this was not a transaction *ultrà vires.* Suffice it to say that in that case the transaction was a totally different one. It was not a purchase of shares by the bank for the purposes of the bank; it was not a speculation in shares at all; but it was the case of a certain sum of money being advanced by the bank to assist in the purchase of shares, which were to be taken by Mr. *Fletcher*, he agreeing, if he got those shares at par, to become a director; and even in the judgment in that case the utmost that is said is that it is difficult to say that the articles of association do not, in terms at least, include the power to enter into a transaction of that description—a transaction wholly different from this.

In the next place, the memorandum of association was very much insisted upon, particularly the latter part, which is as follows:—"The making of purchases, investments, sales, or any other dealings in any of the above-named articles or securities, and the doing of all matters and things which may appear to the company to be incidental or conducive to those objects." That is to say, that the company may do everything that they think is fairly incidental to the carrying on of the particular business specified; but I do not find a syllable in that memorandum which authorizes the purchase of their own shares; and unless there is in plain terms a direct authority to purchase their own shares, it is clear in point of law, and I have no hesitation in saying it is clearly understood among all men of business who give their minds to the subject, that they cannot do so. There must be a clear and distinct power for that purpose. Some of the clauses of the articles of association were also referred to, among others the 42nd. But that has nothing to do with a transaction of this sort; it simply authorizes the directors to accept the surrender and forfeiture of any shares from or by any member desirous of surrendering and forfeiting them, and to accept that surrender and forfeiture on such terms as they think fit. This was not a surrender or forfeiture of shares. The same observation applies to the 37th article, which is simply a direction that every share that shall be forfeited may be resold by the company. Then the 85th article was referred to, which is simply a section giving the board of directors full power to manage the business of the company as they think fit. But that which was most strongly relied on was the 98th clause, the 7th sub-section of which provides that the board "may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions in all respects as they think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of in fully paid-up or other shares, or partly in shares and partly in cash, or in such other manner as the directors deem expedient." But mortgaging or selling their property for shares, even if shares could be held to mean their own shares, as to which it is not necessary to give an opinion, is very different from speculating in the market in their shares, and buying them for cash out of their own funds.

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(1) Law Rep. 7 Eq. 334.

That being so, I am clearly of opinion that this transaction is *ultrà vires*, and if it is *ultrà vires*, it is not a mere voidable transaction, but it is wholly and totally void; it is a transaction which no general meeting could confirm, because it was altogether beyond the power of the company in every sense.

Then the question arises, did what subsequently took place give Mr. *Henry* a right to recover this sum as against the company? What subsequently took place was this: Mr. *Henry* in December paid this sum of money, and on the 4th of February he went to the directors, and the secretary gave him the proper note; he went across to the proper book, and got this sum entered to his credit in his account-current with the company, and it remained to his credit from that time till the company stopped payment. I put the case as high as this, that if the company had given him a promissory note or a debenture, unless the circumstances would have justified such a plea as was said to be a proper plea in *Royal British Bank* v. *Turquand* (1), I should have agreed with the conclusion at which the Master of the Rolls has arrived. Now, what was said in that case? It was this: that if the company gave a deed or a promissory note, and it could not be averred that that deed or promissory note was given in fraud of the company, the holder

(1) 6 E. & B. 327: 2 Jur N.S. 663.

L. J. G.
1870
In re LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.
ZULUETA'S CLAIM.

can recover against the company. But in the eye of this Court, and in the eye of a court of law, beyond all doubt this was a transaction in fraud of the company. It was just as much in fraud of the company as where there is an ordinary partnership and one of the partners takes the partnership funds and pays a private debt to a person who knows that the partnership funds are applicable to other purposes, and not to the private purpose of the partner. Under such circumstances he can be made liable to refund. Mr. *Henry* was dealing with these directors as agents of this company, and these directors were bound to act within the scope of their authority. As regards this particular transaction, they must be taken to have known that they had no power to act as they did, and Mr. *Henry* must be taken to have known the same; and they are, in the eye of the law, in the same position as if the directors with the knowledge of Mr. *Henry* had used the money of the bank to pay some private debts of their own, and charged the bank with it.

Upon these grounds I am clearly of opinion that this is a case in respect of which no claim can be maintained against the bank. If this was not, in point of fact, a claim by Mr. *Henry*, but the money had been paid over to Mr. *Henry*, of course then it would have been necessary to have proceedings to recover the money, which are not necessary now; but if that had been so, I should not have hesitated to say that I should have made a decree against Mr. *Henry* and every one of those directors to restore every sixpence. Nor can I say that persons are to be pitied who act with so much want of caution as to deal with a company in the way in which Mr. *Henry* has done. For, being a stockbroker, he must have known that a purchase by a company of their own shares is not a legal transaction, unless there is a clear, distinct, undoubted, and special authority authorizing them to do so.

Considering that the case has been complicated so much with other matters which really have nothing to do with it, I do not think it right to make Messrs. *Zulueta* pay any costs in the Court below; I shall give them no costs, but the official liquidator will have his costs out of the estate.

Solicitors: Messrs. *Bothamleys & Freeman*; Messrs. *Deane & Chubb*.

BURDICK *v.* GARRICK.

L. J. G.
1870
March 14, 18.

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2 Ch D 493.

Practice—Staying Proceedings pending Appeal—Costs of the Application.

The costs of an application to stay the execution of a decree pending an appeal are in the discretion of the Court. The proper rule is, that they should ordinarily abide the result of the appeal.

A decree was made that accounts should be taken, and that the Defendants should pay what should be found due to the Plaintiffs, and also the costs of the suit. The Defendants moved to stay the execution of the decree pending an appeal to the House of Lords, on the ground that the Plaintiffs were out of the jurisdiction. The Court refused to stay the taking of the accounts or the taxation of the costs, and directed that the costs, when taxed, should be paid to the Plaintiffs' solicitor on his giving satisfactory security for their repayment in case of a reversal of the decree; but the Plaintiffs not being able to give security for the repayment of the money due to them, it was ordered that the amount should be paid into Court, the Defendants undertaking to abide by such order as might be made as to interest; the costs to abide the result of the appeal.

Earl of Shrewsbury v. *Trappes* (1), *Topham* v. *Duke of Portland* (2), *Walford* v. *Walford* (3), discussed.

IN this case a decree was made on a rehearing before the full Court of Appeal on the 24th of January, by which it was ordered that certain accounts should be taken, and that the Defendants should pay what should be found due from them to the Plaintiffs, with interest, and also the costs of the suit (4). The Plaintiffs were resident in *America*. The Defendants presented a Petition of appeal to the House of Lords, and now moved to stay the execution of the decree pending the appeal.

Mr. *Dickinson*, Q.C., and Mr. *G. W. Collins*, in support of the application:—

The ground of the application is, that the Plaintiffs are residing out of the jurisdiction of the Court, and there is danger that if the decree is reversed by the House of Lords the money ordered to be paid to them will not be recovered. It ought therefore to be retained in Court, or at all events the Plaintiffs ought

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(1) 2 D. F. & J. 172.
(2) 1 D. J. & S. 603.
(3) Law Rep. 3 Ch. 812.
(4) Ibid. 5 Ch. 233.

But see as to costs Sherry v Nicholls, [illegible]
Cooper v C 2 Ch D 492

L. J. G.
1870
BURDICK
v.
GARRICK.

to give satisfactory security for its repayment: *Lord* v. *Colvin* (1). With respect to the costs of the application, they are in the discretion of the Court, and it would be reasonable that they should be made costs in the cause: *Earl of Shrewsbury* v. *Trappes* (2); *Walford* v. *Walford* (3).

Mr. *Greene*, Q.C., and Mr. *Hanson*, for the Plaintiffs, contended that no sufficient cause was shewn for the suspension of the decree.

The LORD JUSTICE GIFFARD said that it would not be right to stop the taking of the accounts or the taxation of the costs; but the Plaintiffs must give security for the repayment of any money which would be payable to them, and the solicitor must also give security for the repayment of the taxed costs, in case the decree should be reversed, or else the money must be retained in Court.

Mr. *Greene*, Q.C., and Mr. *Hanson*, for the Plaintiffs:—

With respect to the taxed costs of the suit, the solicitor is willing to give personal security, or an undertaking to refund them in case the decision should be reversed. This was held sufficient in *Gibbs* v. *Daniel* (4). We are entitled to the costs of this application, under the usual practice of the Court, which was settled in *Topham* v. *Duke of Portland* (5), by the same Judges who decided *Earl of Shrewsbury* v. *Trappes*, and therefore overrules that case. *Walford* v. *Walford* was an appeal motion, and does not bear upon the question.

Mr. *Dickinson*, in reply.

SIR G. M. GIFFARD, L.J.:—

With respect to the costs of this application, I should have thought the reasonable rule was, that the costs should follow the result of the appeal, but I cannot depart from the rule laid down after consideration in *Topham* v. *Duke of Portland*, unless there is some subsequent authority to the contrary, and the applicant must therefore pay them. The costs cannot be heavy, and the rule has this advantage, that it shews that the application is made *bonâ fide*.

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(1) 1 Dr. & Sm. 475.
(2) 2 D. F. & J. 172.
(3) Law Rep. 3 Ch. 812.
(4) 4 Giff. 1, 41.
(5) 1 D. J. & S. 603.

(4) S.C. 3 De G. J. & S. 479. 9 Jur. N.S.

With regard to the application itself, the Plaintiffs are out of the jurisdiction, and if no security were given for the repayment of the fund it would practically amount to a denial of the right to appeal. I cannot, therefore, permit the Plaintiffs to receive the money without giving good security. The solicitor must also give satisfactory security—his personal security or undertaking will not be sufficient—for repayment of the costs if the decree is reversed. But I cannot stay the taking of the accounts or the taxation of the costs, and if the Plaintiffs are unable to give security the money must be paid into Court.

March 18. The motion was again mentioned, when

Mr. *Greene*, Q.C., stated that the Plaintiffs were unable to give security for the money which would be payable to them, but that their solicitor was prepared with security for the costs due to him.

Mr. *Dickinson*, Q.C., and Mr. *G. W. Collins*, again mentioned the subject of costs. *Walford* v. *Walford* (1), although in form an appeal motion, was treated by the Court as an original application, because the decree had in the meantime been inrolled, and the order asked for in the notice of motion had become impossible. It appeared from the report of the case in the *Weekly Reporter* (2) and *Law Times* (3), that the reason given by the Court for allowing no costs was, that the costs were in the discretion of the Court (4).

The Lord Justice Wood:—There will be no costs. We have made the order. There will be no costs on either side.

Mr. *Bacon*:—After the inrolment of the decree, surely it is a matter of indulgence to the Defendant.

The Lord Justice Wood:—I do not think it is any indulgence. I think it is the right of the party on giving the undertaking.

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(1) Law Rep. 3 Ch. 812.

(2) 16 W. R. 1161.

(3) 19 L. T. (N.S.) 233.

(4) In *Walford* v. *Walford* the Lord Justice *Wood* in giving judgment made no order as to the costs; but after the judgment of the Court had been given some discussion took place as to the form of the order.

Mr. *Bacon* then asked for the costs of the application.

L. J. G.
1870
BURDICK
v.
GARRICK.

Mr. *Greene*, Q.C., and Mr. *Hanson*, submitted that *Walford* v. *Walford* (1), being in form an appeal motion, could be no precedent on the question of costs for the present application. That case was very special in its circumstances, and the decision could not override the authority of *Topham* v. *Duke of Portland* (2), where the point was solemnly decided after consultation with the Registrar.

SIR G. M. GIFFARD, L.J.:—

In the absence of authority it would appear to be the most reasonable rule that the costs of such an application should abide the result of the appeal. It seems from what was said by the present Lord Chancellor and Lord Justice *Selwyn* in *Walford* v. *Walford*, that notwithstanding *Topham* v. *Duke of Portland* they did not consider there was any settled rule that the costs should be paid by the applicant. And I cannot forget that one of the same learned Judges who decided *Topham* v. *Duke of Portland*, said in the case of *Earl of Shrewsbury* v. *Trappes* (3), that there was no settled rule as to the payment of the costs of an application of this kind; and as the same opinion appears to have been held by the Judges in *Walford* v. *Walford*, I feel myself at liberty to act upon what I consider the fair and reasonable rule, namely, that the costs should abide the result of the appeal.

The order will be that the amount which may be found due to the Plaintiffs on taking the accounts be paid into Court within ten days, after the Chief Clerk's certificate, the Defendants undertaking to abide by any order as to interest which the Court may make. The taxed costs of the suit to be paid to the Plaintiffs' solicitor on his giving satisfactory security. The costs of this application to abide the result of the appeal.

Solicitors: Mr. *Helsham*; Messrs. *Monckton & Monckton*.

Mr. *C. Hall* said, that in *Topham* v. *Duke of Portland* it was laid down that it is the settled practice of the Court that if you come for an indulgence you must pay the costs.

The LORD JUSTICE SELWYN:—No doubt that is very usual; still I think that the costs are in the discretion of the Court, and in the exercise of that discretion we do not think fit to give any costs.

(1) Law Rep. 3 Ch. 812.

(2) 1 D. J. & S. 603.

(3) 2 D. F. & J. 172.

MOSTYN *v.* MOSTYN.

L. J. G.
1870
March 19, 21.

Counsel's Fees—Authority of Solicitor to pledge his Client's Credit.

A solicitor has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them.

THIS was an appeal from an order made by Vice-Chancellor *James* in Chambers in the above suit.

The Appellant, Mr. *William Whittaker Barry,* who was a barrister, was employed as conveyancing counsel by Mr. *Westmacott,* a solicitor, in giving advice and settling conveyances relating to the estate of the late Hon. *Thomas E. M. L. Mostyn.* His fees amounted to £696 10*s.* 6*d.*, of which the sum of £250 was paid on account by Mr. *Westmacott,* leaving a balance due to Mr. *Barry* of £446 10*s.* 6*d.*

Mr. *Mostyn* and Mr. *Westmacott* being both dead, the executors of Mr. *Mostyn* paid the executors of Mr. *Westmacott* £3000 in satisfaction of what was due on Mr. *Westmacott's* bill of costs, which included the fees due to Mr. *Barry.*

A suit was instituted for administering the estate of Mr. *Mostyn,* and Mr. *Barry* carried in a claim against the estate for the amount due to him in respect of his fees. The case was heard before Vice-Chancellor *James* in Chambers, and His Honour refused to allow the claim. From this decision Mr. *Barry* appealed.

Mr. *W. W. Barry* appeared in person in support of the appeal:—

The business in this case was all non-litigious business, and therefore there was no incapacity on the part of counsel and client to contract for the payment of fees. There is a moral obligation moved by a previous request, and that will form a good consideration for a promise to pay: *Lampleigh* v. *Brathwaite* (1).

In ancient times, when a counsel communicated directly with his client, such a promise was legal: *Marsh and Rainsford's Case* (2); and the intervention of a solicitor makes no difference in the law. In modern times a counsel may make an express contract either with his solicitor or with his client, provided the business be not litigious: *Hobart* v. *Butler* (1); *Doe* v. *Hale* (2). *Kennedy* v. *Broun* (3) is not opposed to this, for that case related only to the duties of an advocate. A barrister who has acted as an arbitrator may maintain an action for his fees: *Virany* v. *Warne* (4); *Hoggins* v. *Gordon* (5); *Sinclair* v. *Great Eastern Railway Company* (6); *Grove* v. *Cox* (7). And so if he has been returning officer at an election of guardians: *Egan* v. *Guardians of Kensington Union* (8).

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(1) Hob. 105.

(2) Leon. 111.

As the client may make a contract himself, it follows that his solicitor may make it as his agent. If the solicitor has authority from his client to retain counsel, and to pay him, his authority must also extend to pledging the credit of his client to pay: *Duke of Beaufort* v. *Neeld* (9). In the present case the solicitor promised to pay the fees; for the part payment amounted to a promise to pay: *Cripps* v. *Davis* (10); *Bateman* v. *Pinder* (11); *Peacock* v. *Harris* (12); *Waters* v. *Tompkins* (13).

Mr. *Jones-Bateman*, for the Plaintiff, and Mr. *G. Law*, for the Defendants in the suit, were not called on.

Sir G. M. Giffard, L.J.:—

The facts of this case really raise a very narrow proposition, which is enough to dispose of the case. A counsel was employed by a solicitor in the ordinary way, and had no direct communication with the client. The client has in fact paid the counsel's fees to the solicitor. For the actual decision of the case it is enough to say that when in the ordinary way a counsel is employed by a solicitor, and the fees are paid to the solicitor, the counsel cannot recover them from the client. But even if there had been no such payment by the client to the solicitor, I should have come to the same conclusion in this case. It was properly

(1) 9 Ir. C. L. Rep. 157.

(2) 15 Q. B. 171.

(3) 13 C. B. (N.S.) 677. 9 Jur S 119

(4) 4 Esp. 47.

(5) 3 Q. B. 466.

(6) 21 L. T. (N.S.) 752.

(7) 1 Taunt. 165.

(8) 3 Q. B. 935 (n.)

(9) 12 Cl. & F. 248.

(10) 12 M. & W. 159.

(11) 3 Q. B. 574.

(12) 10 East, 104.

(13) 2 C. M. & R. 723.

L. J. G.
1870
MOSTYN
v.
MOSTYN.

admitted at the Bar that the claim of a counsel against the client is a moral one only, whether the business was litigious or non-litigious, and that the counsel could not maintain an action for his fees against his client without an express promise by the client to pay them. But it was said that here there had been a promise by the client, because the part payment by the solicitor raised an implied promise to pay. Now, I have no hesitation in saying that a solicitor cannot pledge his client's credit to his counsel, and therefore part payment by him cannot convert the moral obligation into a legal debt. The judgment in *Kennedy* v. *Broun* (1) is most accurate in reasoning and sound in law, and that case forms a landmark of the law on this subject. Such applications as the present have, I believe, never succeeded; and, speaking for myself, I may add that I hope never to see the day when a counsel coming into Court to enforce his claim for fees as such against the client will be successful. The appeal must be dismissed with costs.

Solicitors: Mr. *A. Rawlinson;* Mr. *Darley.*

ROSKELL *v.* WHITWORTH.

L. J. G.
1870
March 21, 22.

10 Ch 46

Practice—Issues—25 & 26 Vict. c. 42 (Sir John Rolt's Act).

There is no inflexible rule as to the stage of a cause in which issues will, on the application of a Defendant, be directed to be tried by a jury; the matter being one for the discretion of the Court. If, however, in an injunction suit, the Defendant makes the application, not on the occasion of a motion for an injunction, or a motion to dissolve an injunction, but by an independent motion at any other time, and especially if it is after the disclosure of the Plaintiff's evidence, the Court will require very strong proof that the case is one which the Court itself cannot satisfactorily try.

Decision of *James*, V.C., affirmed.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *James*, who had refused with costs a motion on behalf of the Defendant that one or more issues might be directed to be tried by special jury at the next *Manchester* summer assizes, for the purpose of ascertaining—1. Whether the steam-hammer of

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(1) 13 C. B. (N.S.) 677. 9 Jur NS 119

S. C. a/ hearing [illegible]

L. J. G. 1870 ROSKELL v. WHITWORTH.

the Defendant had been so worked as to occasion a nuisance to the Plaintiffs; and 2. Whether the steam-hammer of the Defendant had been so worked as to occasion a nuisance to Plaintiffs since the same was altered by the Defendant; or that such other issue or issues might be directed as the Court might deem proper, and that the hearing of the cause might be postponed until after the trial of such issue or issues.

The bill was filed on the 9th of June, 1869, by the trustees and incumbent of the Roman Catholic Church of *St. Augustine* at *Manchester*, for the purpose of restraining the Defendant, Sir *Joseph Whitworth,* from working his steam-hammer, or otherwise causing noise or vibration on his works so as to occasion a nuisance or injury to the Church of *St. Augustine,* and the schools and rectory attached thereto, or to the Plaintiffs or other the inmates of the church, schools, and rectory respectively, and from in any way occasioning any nuisance or injury to the Plaintiffs.

The case came on upon motion for an interlocutory injunction on the 23rd of June, and the motion was then directed to stand over until the hearing, upon an undertaking by the Defendant not to work the steam-hammer before 9 A.M., or after 7·30 P.M., so as not to interfere with the daily services at the church.

On the 19th of January, 1870, the Plaintiffs served notice of motion for decree, and gave notice of reading in support of the motion thirty-four affidavits, some of which had been used upon the motion for an injunction.

In support of the present motion an affidavit had been filed on behalf of the Defendant, stating that from the mass of affidavits put in by the Plaintiffs it would be necessary for the Defendant to call several witnesses, most of them scientific; that there would be great expense in getting up the evidence, and, of necessity, a very great conflict on the facts; that since the motion for an injunction the Defendant had expended nearly £700 in altering the bed of the anvil upon which the steam-hammer struck, whereby much of the evidence filed on behalf of Defendant on that occasion became wholly inapplicable to the present position of affairs; and that under these circumstances, with a view to saving expense, and having regard to the great conflict of evidence, the Defendant had been advised to apply for issues.

The Vice-Chancellor *James* having refused the motion (1), the Defendant appealed.

Mr. *Little*, Q.C., and Mr. *Lindley*, in support of the appeal motion:—

The test applicable to questions of nuisance, like the present, is laid down by the House of Lords in *St. Helens Smelting Company* v. *Tipping* (2). Where nuisance depends on personal inconvenience all the circumstances of the locality must be taken into account, and a person who comes into a manufacturing neighbourhood must submit to personal inconvenience arising from manufactories, the case being different from that of injury to property. Here, what is complained of is personal discomfort. The case ought to be tried by a jury; the truth cannot be got at by cross-examination on paper, and a view is necessary. The witnesses are numerous, and cross-examination in *London* would be very expensive. An expert would not carry in his mind the test in *St. Helens Smelting Company* v. *Tipping*. We are entitled to come here by motion: *Fullagar* v. *Clark* (3); *Lancashire* v. *Lancashire* (4). *Lord Cairns' Act*, s. 2, gives the Court power to have a jury, but does not interfere with the existing jurisdiction of sending issues to law: *George* v. *Whitmore* (5). *Bradley* v. *Bevington* (6), and the *dictum* in *Morrison* v. *Barrow* (7), related to complex cases, and their principle is not applicable to a case like the present. The language of *Sir John Rolt's Act*, s. 2, is general, and authorizes an interlocutory application: *Young* v. *Fernie* (1); *Eaden* v. *Firth* (2); *Davenport* v. *Goldberg* (3); *Freeman* v. *Tottenham and Hampstead Railway Company* (4); *Morgan* v. *Fuller* (5); *Other* v. *Smurthwaite* (6).

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(1) 1870. March 3.

Sir W. M. James, V.C.:—

I am of opinion that I ought not to grant this application. The fact that two issues have been tendered by the Defendant [His Honour stated them] goes far to shew that there was a nuisance existing at the time of filing the bill, and all that the Plaintiffs are bound to shew is that there was a nuisance when they filed this bill.

If the Defendant had intended to apply for an issue, he should have done so when the interlocutory motion for an injunction was brought on. Since then it is stated that he has made alterations in his steam-hammer; but the effect of those alterations is not a matter upon which he is entitled to an issue. It may be that he may satisfy me that, having regard to what he has since done, I ought to frame the injunction so as not to prejudice what has been done by him. Moreover, by directing issues I should be putting the parties to the expense of employing a long array of counsel and keeping a long array of witnesses in attendance at *Manchester*. At this stage of the cause I must decline to grant an issue, and the motion is refused with costs.

(2) 11 H. L. C. 642. 11 Jur NS 785.

(3) 18 Ves. 481.

(4) 9 Beav. 259.

(5) 26 Beav. 557.

(6) 4 Drew. 511. 5 Jur NS 562

(7) 1 D. F. & J. 633, 639.

[They also referred to *Bovill* v. *Hitchcock* (7) and *Inchbald* v. *Robinson* (8).]

Mr. *Kay*, Q.C., and Mr. *Hamilton Humphreys*, for the Plaintiffs:—

There is no authority for a distinct application of this nature. "Whenever," in *Sir John Rolt's Act*, does not mean whenever the party pleases. According to the old practice, an issue was not granted before the hearing if the application was opposed, and so it is now: *George* v. *Whitmore* (9); *Morrison* v. *Barrow* (10). In *Eaden* v. *Firth* the Court came to the conclusion that an issue ought to be directed, but that case is no authority to shew that the Defendant may move for an issue at any time. *Bovill* v. *Hitchcock*, *Inchbald* v. *Robinson*, and *Young* v. *Fernie*, are all against the application. *Lord Cairns' Act* and *Sir John Rolt's Act* were intended to enlarge the jurisdiction of the Court, not to facilitate sending parties to law: *Fernie* v. *Young* (11). It is in all cases most inconvenient to have issues directed on a substantive application which obliges the Court to hear a discussion on the merits for the mere purpose of seeing whether the case ought to go to law. In the present case the application is made at a most improper time after the Defendant has seen the Plaintiffs' evidence. The Plaintiffs will have no chance of a fair trial if the case is tried by a *Manchester* jury, who will all be in favour of a manufacturer. The Vice-Chancellor has had the merits of the case before him on the motion for an injunction, and the Court of Appeal will be slow to interfere with his discretion as to the propriety of the trial being before this Court. In *Crump* v. *Lambert* (1), a case of a similar description, an issue was refused.

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(1) 1 D. J. & S. 353. 10 Jur NS 58
(2) 1 H. & M. 573.
(3) 2 Ibid. 282.
(4) 11 Jur. (N.S.) 254.
(5) Law Rep. 2 Eq. 296.
(6) Law Rep. 5 Eq. 437.
(7) Ibid. 3 Ch. 417.
(8) Ibid. 4 Ch. 388.
(9) 26 Beav. 557.
(10) 1 D. F. & J. 633.
(11) Law Rep. 1 H. L. 63, 78.

Mr. *Little,* in reply, referred to *Kent* v. *Burgess* (2).

Sir G. M. Giffard, L.J. :—

The first thing I have to consider in this case is the abstract question of law, whether or no a Defendant may, under any circumstances, be entitled to have an issue sent to a jury upon motion, at such a stage of the cause as this. In my opinion that is a pure matter of discretion for the Court. I think it would be most inexpedient to lay down any hard and fast rule, or to tie the hands of the Court in any way; and I think it is quite consistent with the old, as well as the more modern decisions, to say that it is competent for the Court which is to try the case to take those steps in the cause, to direct those issues, and to direct those modes of trial which it thinks essential to the ends of justice.

With regard to *Sir John Rolt's Act*, there were, before it was passed, numerous instances in which parties coming for an injunction were told they could have no perpetual injunction without first of all obtaining a judgment at law; the object of the Act was to abolish the necessity of any such course, and to impose the duty on this Court of trying the case completely. I do not think that it was intended to oblige this Court to direct an issue, where otherwise it would not have done so, or to call into operation the intervention of a jury when otherwise it would not have done so. Under *Lord Cairns' Act* the Court, if it thinks a jury essential to the purposes of justice, can have the case tried by a jury before itself, and I take it that the clause authorizing the sending issues to a court of law was added in *Sir John Rolt's Act* for this simple reason, that there are some cases fit to be tried by a jury, in which, for the sake of convenience and the saving of expense, it is desirable that the trial should take place in the country. When convenience and the saving of expense require such a course, I take it the Court will direct an issue, but unless a strong case is made will be reluctant to send the trial of the case

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(1) Law Rep. 3 Eq. 409.

(2) 11 Sim. 361, 377.

L. J. G.
1870
Roskell
v.
Whitworth.

into what I may call a foreign jurisdiction. That I believe to be the law, and I do not consider it inconsistent with the case of *Eaden* v. *Firth* (1). Certain I am that it is consistent with the view of Lord *Eldon*, of Lord *Langdale* in *Lancashire* v. *Lancashire* (2), and of the Vice-Chancellor of *England* in *Kent* v. *Burgess* (3), under the old practice, when the hands of the Court were tied more than they are now; and certain I am that it is quite consistent with what was laid down by Lord *Westbury* in *Young* v. *Fernie* (4). Therefore, what I have to determine in this case is, whether in the discretion of the Court (the Court below having already exercised its discretion) this matter ought to be sent to a jury.

In the first place, I quite agree that this application is made at a very unfortunate time. I think that, as a general rule, applications of this sort should be made in the course of the discussion on the application for an injunction, or in the course of the discussion upon the application to dissolve the injunction, or of course sometimes at the hearing. At the same time I think a Defendant may come at other times; but if he does come at another time, and especially if he comes at such a time as this, he must shew almost to demonstration that the case is one which the Court itself cannot satisfactorily try. The time at which this application is made is after service of notice of motion for decree, when the Plaintiffs have disclosed the whole of their evidence. This is a strong reason why the Court, unless there are overwhelming reasons in support of the contrary course, should take the trial of the case upon itself. The Defendant knows exactly what the Plaintiffs' case will be, and knows exactly what every material witness he can produce will say, and would thus have a great advantage over the Plaintiffs on the trial of an issue.

Then, is there any reason why the Court of Chancery should not try this case? As I have already said, the Vice-Chancellor has exercised his discretion upon the subject, and he does not think there will be any difficulty in the way of his trying it. In the face of that, the Court of Appeal would be very reluctant to interfere, unless it saw plainly that there was some overwhelming

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(1) 1 H. & M. 573.

(2) 9 Beav. 259.

(3) 11 Sim. 361, 377.

(4) 1 D. J. & S. 353. 10 Jur. N. S.

L. J. G.
1870
ROSKELL
v.
WHITWORTH

reason why the Court of Chancery must be unfit to try the case. I cannot see any such overwhelming reason. Two grounds have been mainly suggested. First of all there is the general ground, that it is a legal question. But I wholly deny that every legal question is to be sent to a jury, and I wholly deny that every question of nuisance is to be sent to a jury. There have been multitudes of cases decided in the Court of Chancery, and most properly decided, in which the question of nuisance has been tried by the Court itself. Then it was said that there was something special about the locality of *Manchester*, and the well-known case of *St. Helens Smelting Company* v. *Tipping* (1) was referred to, as shewing that where the question is as to a nuisance causing personal inconvenience, you must take into consideration all the circumstances of the locality. But I cannot see why the Court of Chancery should not take into consideration as far as it is right to do so (upon which I express no opinion, for it is not my duty to do so at this moment), the circumstances of the locality of *Manchester*, although I may, in passing, say that I think Mr. *Little* has put his propositions considerably wider than the case of the *St. Helens Smelting Company* v. *Tipping* justifies. Then, again, it is said that this case cannot be properly decided without a view. But the Court of Chancery has the power of arriving at a conclusion by means which, upon the whole, I think in many instances preferable to sending the case to a jury; for if it should turn out at the hearing of the cause that there is such a conflict of evidence as to make further information necessary, the Court can select for itself the most competent person in the kingdom, and can send him down to *Manchester* to view the premises, and can have the report of that person not only as to the conclusion at which he may have arrived, but as to every fact, circumstance, and reason upon which he founds his conclusion. In this case, a man of sound sense, who went over the premises, and took care to have the hammer worked as it ought to be worked, could not well fail to come to a right conclusion on the subject. At this stage of the cause, however, it is not possible for me to direct that course to be pursued. I should have been glad if the parties would have agreed to it, but they have not done so, and all I have to do is to say

(1) 11 H. L. C. 642. 11 Jur. N.S. 785.

L. J. G.
1870
ROSKELL
v.
WHITWORTH.

whether issues are to be directed. Considering, then, in the first place, the stage at which this cause has arrived, and that the Plaintiffs' case has been entirely completed; considering that upon the motion for an injunction the Defendant did not press to have issues directed; considering that, in my judgment, the case can be properly tried in the Court of Chancery, and that the Vice-Chancellor is of that opinion, and that it is competent for the Vice-Chancellor at any time and at any stage of the cause to send down one or more persons to have a view of the premises, and to make a report of the nature which I have stated, not only saying whether there is a nuisance, but what the reasons are upon which that opinion is grounded, I think that this motion must be refused, and, of course, it must be refused with costs.

To that I shall only add this, that although I have said—and I adhere most distinctly to what I have said—that it is competent for the Court, at any stage of the cause, if it thinks the ends of justice require it, to send an issue to a jury, it is not right to encourage applications of this description, for they obviously are very inconvenient, and unnecessarily take up the time of the Court. There is hardly any case in which an issue might not be more properly asked in the course of some interlocutory proceedings, relating to the injunction, where it is necessary, for other reasons, to discuss the merits, and when an application for an issue would be incidental to that discussion.

Solicitors: Messrs. *Cunliffe & Beaumont*; Mr. *J. Elliott Fox*.

ORRELL *v.* BUSCH.

L. J. G.
1870
March 29.

Practice—Transfer of Cause—Concurrent Suits.

7 Ch 578
9 Ch 53.
10 Ch 630

Where a person, knowing that a suit has been instituted in one branch of the Court, files a bill in another branch of the Court in respect of the same subject-matter, the second cause will be ordered to be transferred to the Court to which the first cause is attached, and the Plaintiff in the second cause will as a general rule be ordered to pay the costs of the application for such transfer.

THIS was an application by the Defendants, *G. Busch*, *H. B. Forrer*, and *M. J. Forrer*, for the transfer of the cause from the Court of Vice-Chancellor *James* to that of Vice-Chancellor *Stuart*, to which an earlier suit for administration of the estate of the same testator was attached.

John Orrell died in 1849, having devised his real estate to the use of trustees, and bequeathed to them his residuary personal estate (after bequeathing certain large legacies to be held upon separate trusts), upon trust for his wife during widowhood, and then for his eldest son, *Thomas Orrell*, for life, and after his death for *T. Orrell's* children as he should appoint; and in default of appointment, for *T. Orrell's* children and issue as therein mentioned; and in case of no such children or issue becoming entitled, then upon like trusts for the testator's sons, *Robert*, *John*, and *George*, and their children and issue successively; and upon failure of those trusts upon similar trusts for the benefit of the testator's daughters, and their children and issue successively.

The testator's widow died in 1864; *Thomas Orrell* had died in 1858, a bachelor; so that on the death of the widow, *Robert Orrell* became tenant for life in possession of the real and residuary personal estate.

On the 7th of May, 1869, the surviving trustee having become of unsound mind, the above-named *G. Busch* and *G. L. Jervis* and *James Potter* were appointed trustees by order of the Court.

On the 11th of February, 1870, *Busch* filed his bill (*Busch* v. *Jervis*) against his two co-trustees, *Jervis* and *Potter*, and *Robert Orrell*, alleging that *Jervis* and *Potter* had made over-payments to

Robert Orrell in respect of income, and alleging other irregularities in the administration of the trusts, and praying that the trusts of the will might be carried into execution under the direction of the Court. This bill was marked for Vice-Chancellor *Stuart*.

On the 19th of March, 1870, *Robert Orrell* and his infant children filed their bill (*Orrell* v. *Busch*) against the three trustees and some of the parties interested under the trusts, stating the institution of the first suit, controverting the allegations on which the necessity for that suit was founded, and alleging that it would be for the benefit of the trust estate to have *Busch* removed from being a trustee, that it would only be a useless expense to have the trusts carried into execution by the Court, and that *Busch* was the only hindrance to the trusts not being carried out harmoniously. The bill prayed for the removal of *Busch* and the appointment of a new trustee in his place, for an injunction to restrain him from proceeding with his suit and from intermeddling with the estate, and for a receiver.

This latter suit was attached to the Court of Vice-Chancellor *James*, and on the 24th of March an injunction was applied for; but the motion was directed to stand over till the next seal, the Defendants to file their affidavits within a fortnight. In *Busch* v. *Jervis* nothing had been done before the Judge.

Busch and two infant Defendants now moved to have *Orrell* v. *Busch* transferred to Vice-Chancellor *Stuart*.

Mr. *Fry*, Q.C., and Mr. *Robinson*, for the motion.

Mr. *Fischer*, for some of the Defendants.

Mr. *Little*, Q.C., and Mr. *Marten*, for the Plaintiffs:—

It is not the practice to transfer a cause to the Court in which another suit has been instituted unless there has been a decree made in that suit. Vice-Chancellor *James* has had the matter before him; Vice-Chancellor *Stuart* has never had any cognizance of *Busch* v. *Jervis*. There is a pending motion in this suit, and if it is transferred fresh leaders must be retained, and great additional expense occasioned. The Plaintiffs were, under the General Orders, entitled to mark their bill for which Court they thought fit. They are substantially the owners of the property; the costs of administration will come out of their fund, and a suit instituted by them ought not to be transferred in order to be in the same Court as the unreasonable suit of a new trustee who files a bill within a few months after his appointment.

SIR G. M. GIFFARD, L.J.:—

The bill in *Busch* v. *Jervis* was filed on the 11th of February, that of *Orrell* v. *Busch* on the 19th of March, the Plaintiffs in the latter suit being perfectly aware of the institution of the former, and, in fact, referring to it in their bill. Both suits relate to the administration of the same trusts. It is highly inconvenient that when a suit has been instituted in one branch of the Court, another suit relating to the same matter should be instituted in another branch. It is true that the General Orders give a Plaintiff liberty to choose his Court; but this cannot have been intended to give him liberty to mark a bill for one Judge when another Judge has, to his knowledge, already obtained seisin of the subject-matter by reason of the institution of an earlier suit attached to his Court. Such a proceeding leads to races for decrees, and causes unnecessary costs. The order for transfer of *Orrell* v. *Busch* to the Court of Vice-Chancellor *Stuart* must therefore be made. On the present occasion I shall leave the costs of this motion to be dealt with by Vice-Chancellor *Stuart* together with the other costs; but I desire it to be understood that in future, where a party knowing that a suit has been instituted in one branch of the Court files his bill in another branch of the Court in respect of the same subject-matter, if an application to this Court for a transfer of the second cause becomes necessary, the Plaintiff in that cause will, as a general rule, be ordered to pay all the costs of the application.

Solicitors: Mr. *J. Elliott Fox*; Messrs. *Sharpe, Parkers, & Pritchard*; Messrs. *Chester & Urquhart*.

L. J. G.
1870
March 28.

Ex parte PALMER.
In re PALMER.

Bankruptcy—Practice—Pending Proceedings—Appeal from Judge of County Court—Bankruptcy Act, 1869, ss. 71, 130—*Bankruptcy Repeal Act*, 1869, s. 20—*Rules in Bankruptcy*, 1870, *Rules* 143, 319.

Pal 473

Where pending proceedings in a District Court in Bankruptcy have been transferred by the Lord Chancellor to a County Court under sect. 130 of the *Bankruptcy Act*, 1869, an appeal from a decision of the County Court Judge, under the powers of the Act of 1861, lies to the Court of Appeal in Chancery, not to the Chief Judge in Bankruptcy.

THOMAS PALMER, the Appellant in this case, was adjudicated bankrupt in the *Manchester* District Court of Bankruptcy on the 5th of October, 1869. On the 16th of February, 1870, after the *Bankruptcy Act*, 1869, had come into operation, he applied to the Judge of the County Court of *Manchester*, to which Court the proceedings had been transferred, under the 130th section of the *Bankruptcy Act*, 1869, for his order of discharge. The Judge, being of opinion that the bankrupt had contracted debts without reasonable expectation of payment, made an order on the same day, granting the discharge, but coupling it with the condition that he should pay £225 to his assignees by three annual instalments. From this order the bankrupt appealed. The appeal was entered on the 17th of March, and served a few days later (1).

Pal 484

(1) The sections, or portions of sections, of the Acts and the Rules in Bankruptcy, particularly referred to in the argument, were the following:

Bankruptcy Act, 1869 (32 & 33 Vict. c. 71):—

Sect. 71. "Every Court having jurisdiction in Bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act. Any person aggrieved by any order of a local Bankruptcy Court in respect of a matter of fact or of law made in pursuance of this Act may appeal to the Chief Judge in Bankruptcy, and it shall be lawful for such Judge to alter, reverse, or confirm such order, as he thinks just. Any order made by the Chief Judge in Bankruptcy, whether in respect of a matter brought before him on appeal, or not, shall be subject to an appeal to the Court of Appeal in Chancery (which Court, for the purposes of this Act, shall be and form a Court of Record, and shall have all the jurisdiction, powers, and authorities of the Court of Bankruptcy, to be exercisable either originally or on appeal, and shall have all the powers and authorities of the Court of Chancery relative to the trial of questions of fact by jury, issue, or otherwise), and also

L. J. G.
1870
Ex parte PALMER.
In re PALMER.

Mr. *De Gex*, Q.C., and Mr. *Jordan* (of the Common Law Bar), for the Appellant.

Mr. *Roxburgh*, Q.C., and Mr. *Bardswell*, for the assignees, took a preliminary objection that the appeal should be brought to the Chief Judge in Bankruptcy, not to this Court. Moreover, the

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with the leave of the Court of Appeal to the House of Lords; but no appeal shall be entertained under this Act except in conformity to such rules of Court as may for the time being be in force in relation to such appeal."

Sect. 130. "Such part of the business pending in any country District Court of Bankruptcy, as the Lord Chancellor thinks fit, shall be disposed of by the registrar of that Court (who shall, for that purpose, continue to have and discharge all his powers and authorities, rights and duties), and the residue of that business shall be transferred to the *London* Bankruptcy Court, or to such County Court or County Courts as the Lord Chancellor, by order before or after its abolition, thinks fit to direct; but subject as aforesaid, the office of any registrar in such country District Court shall be abolished."

Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83):—

Sect. 20. "The enactments described in the schedule to this Act are hereby repealed, but this repeal shall not affect the past operation of any such enactment, or revive any Court, office, jurisdiction, authority, or thing abolished by any such enactment, or affect the validity or invalidity of anything done or suffered before the commencement of this Act, or any right, title, obligation, or liability accrued, or restriction imposed, before the commencement of this Act, by or under any such enactment, or affect any principle or rule of law derived from any enactment contained in the first and secondly mentioned Acts in the schedule to this Act; nor shall this repeal interfere with the prosecution or affect the course of any legal proceeding pending in bankruptcy or otherwise, under any such enactment, before the commencement of this Act; but, subject to the provisions of the *Bankruptcy Act*, 1869, and the *Debtors' Act*, 1869, such proceedings shall be prosecuted as if this Act had not passed; nor shall this repeal interfere with the institution or prosecution of any proceeding in respect of any offence committed against or any penalty or forfeiture incurred under any enactment hereby repealed."

General Rules in Bankruptcy of January, 1870:—

Rule 143. "An appeal against a decision or order of the Chief Judge in Bankruptcy or a Judge of a County Court shall be entered with the registrar of appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

Post 484

Rule 319. "The foregoing rules shall apply, in exclusion of all other rules and orders heretofore made, to all proceedings commenced under the Act; but the principles, practice, and rules on which Courts having jurisdiction in bankruptcy have heretofore acted in dealing with proceedings in bankruptcy, or otherwise, shall be observed by any Court with respect to the further prosecution of any proceedings pending in any of such Courts on the 31st of December, 1869," &c.

L. J. G.
1870
Ex parte PALMER.
In re PALMER.

appeal was too late, for the 143rd of the General Rules in Bankruptcy prescribed that no appeal from the Chief Judge or any County Court Judges could be brought after twenty-one days. The 20th section of the *Bankruptcy Repeal Act*, 1869, entirely repealed the *Bankruptcy Act*, 1861; and although it enacted that pending legal proceedings in bankruptcy should not be interfered with, yet they were to be prosecuted "subject to the provisions of the *Bankruptcy Act*, 1869." They must, therefore, be carried on under the practice introduced by that Act, and all orders made in such proceedings were orders "made in pursuance of the Act," within the meaning of the 71st section.

Mr. *De Gex*, Q.C., and Mr. *Jordan*, for the Appellant, contended that the 71st section of the *Bankruptcy Act*, 1869, and the 319th of the General Rules only applied to bankruptcy commenced after the passing of the Act. The 20th section of the *Bankruptcy Repeal Act*, 1869, provided that "the repeal should not affect the course of any legal proceedings pending in bankruptcy;" but such proceedings should be carried on subject to the *Bankruptcy Act*, 1869. Under the old law the course of proceeding in this case would have been that the bankrupt would have appealed first to the Commissioner, and then would have had thirty days to appeal to this Court. The 130th section of the *Bankruptcy Act*, 1869, substituted the County Court Judge for the Commissioner; but, subject to that alteration, the former course of proceeding continued. The Act was divided into distinct portions, and the 71st section, which applied to new bankrupts, could not be imported into Part VIII. of the Act, which consisted of temporary provisions for pending business.

Mr. *Roxburgh*, in reply.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that this being a proceeding under the old system, and in respect of an order of discharge, the appeal is properly brought here. The 319th rule makes a clear distinction between proceedings commenced after the commencement of the *Bankruptcy Act*, 1869, and those which were then pending. The 20th section of the *Bankruptcy Repeal Act*, 1869, says that, although the Act of 1861 is repealed, this repeal shall not interfere with the prosecution or affect the course of any legal proceedings pending in any bankruptcy before the commencement of the Act of 1869. It is a strong point in the Appellant's favour that, by a contrary construction, he would be deprived of the thirty days allowed for appeal by the Act of 1861.

The appeal was then argued on the merits.

The LORD JUSTICE GIFFARD was of opinion that the case did not come within the provisions of the 159th section of the *Bankruptcy Act*, 1861, and made an unconditional order of discharge.

Solicitors: Mr. *A. D. Smith*; Messrs. *Fawcett, Horn, & Hunter.*

Ex parte ANDERSON.
In re ANDERSON.

L. J. G.
1870
April 23, 26.

Bankruptcy—Jurisdiction—Injunction—Undertaking—Appeal—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), ss. 13, 65, 66, 71, 72—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict.* c. 83), s. 20.

Under the *Bankruptcy Act*, 1869, the Court of Bankruptcy has jurisdiction to grant, in a summary way, an injunction to restrain a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy; and such an injunction may be granted *ex parte* on such a case being made as would induce the Court of Chancery to grant it upon bill filed to impeach the assignment.

This jurisdiction may be exercised in a bankruptcy commenced under the *Bankruptcy Act*, 1861, and transferred under the 130th section of the Act of 1869.

The person obtaining such an order must give an unqualified undertaking to be answerable for damages, not merely an undertaking to be answerable for damages out of the assets; and also an undertaking to institute, within a limited time, proceedings to set aside the alleged fraudulent assignment.

Where pending proceedings in a district Court of Bankruptcy have been transferred by the Lord Chancellor to a County Court under sect. 130 of the *Bankruptcy Act*, 1869, an appeal from a decision of the County Court Judge under the powers of the Act of 1869 lies, in the first instance, to the Chief Judge in Bankruptcy, not to the Court of Appeal in Chancery.

Ex parte Palmer (1) distinguished.

6 Ch. 37
19 Eq 21
— 52
6 Ch 357
— 846
7 Ch 21
18 Eq 312
7 Ch 497
7 C.P. 300
8 Ch 83
9 Ch 264
9 Ch 771
10 Ch 225
20 Eq 285

THIS was an appeal from an order of the County Court at *Walsall*, granting an injunction to restrain the intended sale of certain

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(1) *Ante*, p. 470.

14 Ch D. 266, 15 Ch D. 225 17 Ch D 14/15

L. J. G.
1870
Ex parte ANDERSON.
In re ANDERSON.

pictures, formerly the property of *Matthew Anderson*, a bankrupt, which had been assigned by him for value on the 18th of December, 1869, to his nephew, *C. K. Anderson*.

Matthew Anderson was adjudicated a bankrupt on his own petition in the *Newcastle* Bankruptcy Court, on the 24th of December, 1869, and when the *Bankruptcy Act*, 1869, came into operation the proceedings in the bankruptcy were, by an order made by the Lord Chancellor under the provisions of that Act, transferred to the County Court at *Walsall*. The assignment of the 18th of December, 1869, was made in pursuance of an arrangement come to at a meeting of Mr. *Matthew Anderson's* creditors, that the pictures in question, and other property belonging to him, should be assigned to the nephew for a sum of money, which was calculated as enough to pay to all the creditors a composition of 6*s.* 8*d.* in the pound. This money was paid by the nephew, and the pictures were delivered over to him. Most of the creditors received their composition, but the two largest creditors refused to receive theirs when it was tendered to them, and their opposition to the proceedings led to the bankrupt presenting his petition to the Court. The largest creditor was appointed creditors' assignee. *C. K. Anderson* had the pictures removed to *London*, and sent them to Messrs. *Christie & Manson* to be sold, and they advertised them for sale on the 18th of March, 1870. The creditors' assignee alleged that the assignment to the nephew was fraudulent, and made at an undervalue, and took various examinations in the County Court with the view of proving this. He was aware of the intended sale of the pictures by Messrs. *Christie & Manson*, but at first took no steps to prevent it. However, on the 11th of March, 1870, he applied *ex parte* to the County Court, and obtained an order for an injunction to restrain *C. K. Anderson*, his servants and agents, and in particular Messrs. *Christie & Manson*, from selling or disposing of the pictures. The order granting this injunction contained an undertaking by the creditors' assignee "to abide by any order the Court may make as to payment (out of the moneys received or to be hereafter received by him in this matter) of damages, in case the Court shall be hereafter of opinion that *C. K. Anderson* has sustained any loss by reason of this order, which the assignee ought to pay out of such moneys."

L. J. G.
1870
Ex parte ANDERSON, *In re* ANDERSON.

From this order *C. K. Anderson* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Bagley*, for the Appellant:—

On the merits of the case we say there is no ground for the injunction. But even if there be a sufficient case in a proper proceeding, we say that the Act of 1869 gives no jurisdiction to restrain in this summary way a person who is an entire stranger to the bankruptcy proceedings from dealing with property which is *primâ facie* his own. A bill in Chancery ought to have been filed to impeach the assignment. Sects. 13, 65, 66, and 72, which are the material ones, confer no such jurisdiction on the Court of Bankruptcy. But even if there be such a jurisdiction in a bankruptcy the proceedings in which were commenced under the Act of 1869, it has no application to a bankruptcy commenced under the Act of 1861. Sect. 20 of the *Bankruptcy Repeal Act*, 1869, reserves all existing rights. At any rate, such an order ought not to have been granted *ex parte*, especially considering the delay in asking for it in this case. Moreover, the undertaking as to damages is clearly insufficient; it ought to have been in the unqualified form always adopted by the Court of Chancery, and the assignee ought to have been bound to take proceedings at once to impeach the assignment to the Appellant. This assignment would not be an act of bankruptcy, and there would be no relation back on the debtor's own petition: *Cook* v. *Caldecott* (1); *Lee* v. *Hart* (2).

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the creditors' assignee:—

This is an order made entirely under the Act of 1869, and consequently the appeal is brought to the wrong Court. The appeal should have been taken first to the Chief Judge in Bankruptcy: *Bankruptcy Act*, 1869, ss. 71, 72. It is quite a different case from *Ex parte Palmer* (3).

[The LORD JUSTICE GIFFARD here suggested that it would save expense to have the case disposed of at once by this Court, and Mr. *De Gex* withdrew his objection.]

It was intended that the Act of 1869 should be retrospective

(1) Moo. & Mal. 522.
(2) 11 Ex. 880.
(3) *Ante*, p. 470.

L. J. G.
1870
Ex parte ANDERSON.
In re ANDERSON.

as to new methods of procedure. In matters of procedure an Act of Parliament generally takes effect at once: *Kimbray* v. *Draper* (1). With regard to the jurisdiction to grant an injunction against a third party, it was the intention of the Act of 1869 that the Court of Bankruptcy should be able to do complete justice. In ancient times the jurisdiction of the Court of Bankruptcy was very limited, but it has been from time to time extended. By sect. 12 of the Act of 1849 (12 & 13 Vict. c. 106) the jurisdiction was expressly limited to parties to the bankruptcy and other persons who should come in and submit to the jurisdiction. In sect. 72 of the Act of 1869 those words of restriction are omitted, and the Court can now deal with third parties. There can be a relation back under a deed of assignment for creditors under the Act of 1861: *Exley* v. *Inglis* (2). As to the merits the evidence affords ample ground for granting the injunction.

Mr. *Roxburgh*, in reply.

SIR G. M. GIFFARD, L.J.:—

The question of jurisdiction in this case is no doubt of considerable importance; but as I have had an opportunity of considering it not only antecedently, but for some time yesterday, I am prepared to dispose of this case at once.

The first question that arises is, whether the appeal is brought in the right Court; and although Mr. *De Gex* has very properly waived his objection, it is right that I should give an opinion upon the subject. The case of *Ex parte Palmer* (3) was an appeal in respect of an order of discharge. That order was made under the Act of 1861, and the discharge depended completely and entirely on that Act, under which the bankrupt had thirty days for the purpose of appeal, and had a right to appeal direct to this Court. I was of opinion that the right of direct appeal to this Court was not taken away, and accordingly I entertained the appeal and varied the order that had been made. The order now under appeal is an order dependent entirely on the Act of 1869; the power to make any such order, if power there be, emanates entirely from that Act.

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(1) Law Rep. 3 Q. B. 160.

(2) Law Rep. 3 Ex. 247.

(3) *Ante*, p. 470.

This case, therefore, is in no way concluded by *Ex parte Palmer* (1). If, then, we look at the Act of Parliament, the matter, I think, is reasonably clear. The 20th section of the repealing Act in substance provides that the Act of 1861 shall be repealed; but that as regards pending proceedings and all proceedings which originated under the Act of 1861, so far as the powers of the Act of 1861 are concerned, the Act shall not be considered as having been repealed; and it is enacted that the repeal shall take away none of the rights which were conferred by the Act of 1861. Therefore, where the proceedings have originated under the Act of 1861, we must, for the purpose of determining what is the proper Court for the appeal, consider whether the order was made under the powers of the Act of 1861, or of the Act of 1869; and if we come to the conclusion that the order is dependent on the Act of 1869, the saving of the rights conferred by the Act of 1861 has no application. As to proceedings under the Act of 1869, the 72nd section is distinct in terms that no appeal shall lie from the decisions of the Court, except in manner directed by the Act—namely, an appeal first of all to the Chief Judge, and then an appeal from the Chief Judge to this Court. Therefore, if the objection had not been waived, I should have been obliged to dismiss this appeal on the ground that it was not brought into the proper Court. It will therefore be proper to preface my order by stating in terms that the assignee waived the objection of there not having been an intermediate appeal to the Chief Judge in Bankruptcy.

Upon that waiver I can, of course, deal with the case, and the first question that I have to consider is a question of jurisdiction. I quite agree that it is an important one. I do not propose to enter at length into the facts which raise this question; it is enough for me to say that the assignee alleges certain property to belong to the estate of the bankrupt. The Appellant controverting this case alleges that the property belongs to himself by virtue of a purchase and by virtue of a deed, which he says are a valid purchase and a valid deed. The assignee rejoins that the deed and purchase are such as ought to be set aside, and cannot be valid as against him as representing the creditors.

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(1) *Ante*, p. 470.

L. J. G.
1870
Ex parte ANDERSON.
In re ANDERSON.

Now, without going into the facts, it is enough for me to say that there is a question to try—at what, if there were a suit in Chancery, would be the hearing of the cause—as to the validity of this deed, and that, if the facts appearing in this examination had been detailed in a bill, a case would have been made upon which an interim injunction would have been granted. That being so, the next thing I have to look to is the question of jurisdiction. Now this bankruptcy originated under the Act of 1861, not under the Act of 1869. But under the 130th section of the Act of 1869 the Lord Chancellor has power to transfer, and he has transferred, amongst others, these particular proceedings in bankruptcy to the local district Bankruptcy Court, being the County Court. My opinion is that, where proceedings have been so transferred, the Bankruptcy Court to which they have been transferred has (subject, of course, in many respects to the provisions of the Act of 1861) the same jurisdiction under the 71st and 72nd sections of the Act as if the proceedings had originated under the Act of 1869. Those provisions apply to modes of procedure and modes of procedure only; they take away, as far as I can see, no right. I can see no sort of inconvenience that would arise from saying that they are to be construed retrospectively, and it is quite in accordance with principle, it is quite in accordance with convenience, and it is quite in accordance with the terms used, that they should be construed retrospectively and as applying to bankruptcies which have preceded the Act of 1869, but of which the Courts have seisin by reason of the transfer made by the Lord Chancellor.

That being so, I have to consider whether there would have been jurisdiction to make such an order as that under appeal if the proceedings had commenced under the Act of 1869. Now, the 13th section, I quite agree, has not any operation whatever on the present case. [His Lordship read the section]. The object of this clause, as I understand it, is merely to preserve the property pending the Petition. It gives the Court of Bankruptcy power to intervene, though there is no person who can be Plaintiff at law or in equity on behalf of the estate. The object was that, the moment the Petition was presented, there might be a receiver or a manager, so that the property might be preserved up to the time of adjudication. If such a case were to occur as that of a Petition

L. J. G.
1870
Ex parte
ANDERSON.
In re
ANDERSON.

presented under the Act of 1861 and no adjudication made, I apprehend that then the 13th clause might be brought to bear; but I think that the 13th section has no application to a case like the present, where there has been a complete adjudication, and where there is before the Court an assignee who could be Plaintiff in an action at law or suit in equity. It is the absence of a proper plaintiff which renders necessary the special powers conferred by the 13th section, and I cannot treat it as cutting down the extent of the jurisdiction given by the subsequent clauses of the Act. It is, in fact, a distinct enactment standing by itself for the mere purpose of preserving the property until there is an adjudication and a person before the Court who can stand in the position of a Plaintiff.

Then we come to the 65th, 66th, and 72nd sections of the Act. [His Lordship read the 65th section.] I think that this section clearly gives the Chief Judge complete jurisdiction—a jurisdiction at least as extensive as if he were sitting in the Court of Chancery, and dealing with a suit instituted by proper plaintiffs.

Then, the matter in the present case being in a local Court of Bankruptcy, we must turn to the 66th section. [His Lordship read the section.] This language is perfectly plain; it says, in so many words, that a Judge of the Court of Bankruptcy shall have all the powers of a Judge of Her Majesty's High Court of Chancery, and that the orders of such Judge may be enforced accordingly in manner prescribed.

Before going to the 72nd section it may be well to turn to the Act of 1849, and see how very different the terms of the 72nd section of the present Act are from those of the 12th section of the Act of 1849, which laid down and defined the jurisdiction of the Bankruptcy Court under that Act. [His Lordship read the 12th section of the Act of 1849.] There the jurisdiction is, in terms, confined to persons actually within the bankruptcy, or coming and submitting to the jurisdiction. If we then turn to the 72nd section the contrast in the terms is very strong. [His Lordship read the 72nd section of the Act of 1869.] With respect to the word "parties" there used, Mr. *Roxburgh* argued that it meant parties to the bankruptcy; but in my opinion it means parties to the litigation. The terms of this clause in my opinion give the Court

L. J. G.
1870
Ex parte ANDERSON.
In re ANDERSON.

9 Ch 671
12 Eq 62

complete jurisdiction to decide every question that it may be considered necessary to decide with a view to the distribution of the bankrupt's estate. Is, or is not, the question in the present case, one which it is necessary to decide with a view to the distribution of the bankrupt's estate? I am clearly of opinion that it is. I have no doubt it was the intention of the Legislature that the Bankruptcy Courts should be complete and sufficient in themselves; and that they should, for the purpose of making a complete distribution of the bankrupt's property, exercise at least all the powers possessed by any Judge of the Court of Chancery. Now, beyond all doubt, if the assignee had filed a bill, the Court of Chancery might have granted an injunction and afterwards decided the question whether the purchase was valid, and that being so, I am of opinion that there was jurisdiction to make the Order appealed from.

We come then to the merits, and I do not think that there are sufficient grounds for discharging the *ex parte* injunction, although I should have been better pleased if it had been applied for at some earlier period. These matters are very much within the discretion of the Court, and seeing that the Court had before it the examinations of the persons interested, I am not disposed to interfere with the exercise of that discretion; though it must be borne in mind that the jurisdiction to make such Orders is of a very delicate nature, and ought not to be hastily exercised, and that except in cases of necessity such *ex parte* applications ought by no means to be encouraged.

There remain two points as to the form of the Order, which I think are material. The first is as to the form of the undertaking. I have no hesitation in saying that the Court ought to follow the forms which have been universally adopted in the Court of Chancery. It is only since a somewhat recent date that these undertakings have been introduced into the Court of Chancery, but they are essential to the ends of justice. They form the only means by which, if from misrepresentation or otherwise an *ex parte* or any other interim injunction is improperly granted, the person prejudiced by that injunction, if it has been wrongly granted, can have redress. And the Court, whether the party applying for the injunction be assignee in bankruptcy, or executor, or liquidator, or whoever he may be, has invariably adopted the rule of taking an unlimited undertaking to pay, not merely an undertaking to pay out of the assets. I think, therefore, that there ought to be inserted in this Order an unlimited undertaking, in precisely the form which is adopted by the Court of Chancery.

I think, also, that there ought to have been taken, in this case, a precaution which would not have been necessary in the Court of Chancery, because in the Court of Chancery this injunction could only have been obtained in a suit regularly instituted for setting aside the purchase, and the Defendant would have had means to compel the Plaintiff to have the question tried in due course, or to pay the costs of the proceedings. Here an injunction is granted without any proceedings having been taken to set aside the purchase. I think it essential, for the ends of justice, that whenever an interim injunction is granted by the Court of Bankruptcy, it should be not only on an undertaking as to damages, but also on an undertaking that the party who obtains it shall prosecute the proceedings which are requisite for the purpose of determining the question on the footing of which the injunction has been granted. This Order, therefore, ought to have contained an undertaking on the part of the assignee to take proceedings in the local Bankruptcy Court, within some limited period, for the purpose of setting aside the purchase and recovering the property. It is not fair to a person against whom an injunction is obtained *ex parte*, to oblige him to take the initiative in proceedings to get the question tried. Subject to those two alterations, I think the Order ought to stand; and the course which I propose to take is this: the assignee, of course, must have his costs out of the estate. If he had insisted on the objection that the appeal was not brought in the proper Court, I should not have dismissed the application with costs, as I think it very likely that the parties were misled by the case of *Ex parte Palmer* (1), and, moreover, this is a proceeding under a new Act of Parliament, the practice under which has not been hitherto settled. What I think will do justice between the parties is this: that the deposit shall be returned, but that if the assignee fails in setting aside the purchase, then the Appellant shall have his costs of this appeal. On the other hand, if the assignee succeeds in

(1) *Ante*, p. 470.

L. J. G.
1870
Ex parte ANDERSON.
In re ANDERSON.

setting aside the purchase, the Appellant must pay all the costs of the appeal. This will be like making the costs of an appeal costs in the cause.

Solicitor for the Appellant: Mr. *James Crowdy.*

Solicitor for the Assignee: Mr. *W. H. Duignan,* agent for Messrs. *Duignan, Lewis, & Lewis, Walsall.*

L. J. G.
1870
March 28.

Ex parte BLAIR.
In re MACKLE.

Bankruptcy—Practice—Pending Proceedings—Appeal from Registrar—6 & 7 Vict. c. 73, *s.* 37—*Bankruptcy Act*, 1869, *ss.* 71, 130—*Rules in Bankruptcy*, 1870, *rule* 143.

6 Ch. D. 352

Where a Registrar is acting in a matter pending in a district Court under an order of the Lord Chancellor made in pursuance of the 130th section of the *Bankruptcy Act*, 1869, an appeal from his decisions lies to the Court of Appeal in Chancery.

The power of the Registrar to tax costs in bankruptcy is independent of the *Attorneys' and Solicitors' Act*, and a bill of costs may therefore be taxed by the Registrar without any special order, although twelve months have elapsed since its delivery.

The proceedings in a bankruptcy in a district Court were suspended under the 110th section of the *Bankruptcy Act*, 1861, and the bankrupt obtained his discharge before the passing of the *Bankruptcy Act*, 1869:—

Held, that the bill of costs of the assignee's solicitor for business done after the resolution to suspend proceedings, but before the order of discharge, was properly brought to the registrar of the district for taxation, and that he was bound to tax it, although more than twelve months had elapsed since its delivery.

THIS was an appeal from an order of Mr. Registrar *Lee*, of the *Liverpool* District Bankruptcy Court, acting under the order of the Lord Chancellor.

J. O'Neill Mackle was adjudicated bankrupt under the Act of 1861 in October, 1867, and Mr. *Blair* was appointed his creditors' assignee.

On the 14th of November, 1867, his creditors passed a resolution, which was afterwards confirmed, that the proceedings in bankruptcy should be suspended under the 110th section of the *Bankruptcy Act*, 1861. On the 17th of December, 1867, *Mackle* obtained his order of discharge. Mr. *John Best* acted as solicitor to the estate in the bankruptcy; and on the 18th of January, 1868, he delivered to *Blair*, a bill of costs for business done in the bankruptcy previously to the order of discharge, amounting to £100 18*s.* 11*d.*, and shortly afterwards he delivered a second bill of costs to a small amount for business done subsequently to the order of discharge.

On the 30th of December, 1869, the Lord Chancellor, under the provisions of the *Bankruptcy Act*, 1869, made an order "that such part of the matters pending in the *Liverpool* District Court of Bankruptcy as are mentioned in the schedule of this order shall be transferred to the Courts the names of which respectively are set opposite to the respective matters in the said schedule, and as to the residue of the said business such part as can be discharged by the Registrar of the *Liverpool* Court of Bankruptcy under the powers, rights, and duties now possessed by him by virtue of any statute, rule, or otherwise, shall be disposed of by him, and all such part of the residue of the business of the said *Liverpool* District Court as cannot be disposed of by him shall be and the same is hereby transferred to the County Court of *Lancashire* holden at *Liverpool*."

Mr. *Best* also subsequently became bankrupt, and his assignee, in February, 1870, brought an action against *Mackle's* assignee to recover the amount of the bills of costs. Thereupon *Mackle's* assignee made an application to the Registrar of the *Liverpool* Court of Bankruptcy to tax the bills of costs, which the Registrar refused on the ground that more than twelve months had elapsed since they were delivered. From this decision *Mackle's* assignee appealed, but the appeal was withdrawn so far as related to the second bill of costs, and the arguments were confined to the first bill, which related to business done before the order of discharge.

Mr. *W. Willis* appeared for the Appellant.

Mr. *Bardswell*, for Mr. *Best's* assignee, took the preliminary objection that there was no appeal to the Court of Appeal in Chancery from the Registrar's decision. Under the Act of 1861 all bills of costs were to be taxed by the Registrar, subject to an appeal to the Commissioner; and no appeal could be brought from the Registrar directly to this Court: *In re Taylor* (1). There was no mention of the Registrar in the 71st section of the *Bankruptcy Act*, 1869 (2), nor in the 143rd of the General Rules in Bankruptcy of January, 1870 (3), which regulate the appeals under the new Act; and if there is any appeal from the Registrar, it must be to the County Court Judge who takes the place of the Commissioner.

SIR G. M. GIFFARD, L.J.:—

I do not think there is any force in the objection. The Registrar acting under the order of the Lord Chancellor is on a different footing from that on which he stood under the Act of 1861. He was then simply the officer of the Commissioner, and the Court held that all questions ought to be referred to the Commissioner. But the case now is quite different. The 14th section of the Act of 1861 directs the Registrar to tax and settle all bills of costs. Then the 130th section of the Act of 1869 enacts that such part of the business pending in any county district Court of Bankruptcy as the Lord Chancellor shall think fit shall be disposed of by the Registrar of that Court. The Lord Chancellor has in this case made an order that the Registrar is to discharge such part of the business as can be discharged by him under any of the powers now possessed by him under any statute, rule, or otherwise. Under this order the Registrar, as to such matters as are within his powers, is in the same position as if he were a Commissioner; and as no intermediate appeal is given by the Act, I am of opinion that an appeal will lie to this Court.

Mr. *W. Willis* then contended that the power of the Registrar to tax costs was inherent in the jurisdiction of the Court of Bankruptcy, and did not depend upon the *Attorneys' and Solicitors' Act* (6 & 7 Vict. c. 73). It was therefore governed solely by the practice of the Court, and was not subject to the rules laid down by that Act as to the time within which bills must be taxed: *Ex parte Woolston* (4); *Ex parte Pemberton* (5).

All the costs included in this bill were incurred before the order of discharge, although some of the items were subsequent to the suspension of the proceedings. Such costs were properly paid out of the estates.

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(1) Law Rep. 4 Ch. 352.

(2) See the section set out, *ante*, p. 470, n.

(3) See the rule set out, *ante*, p. 471, n.

(4) 3 M. D. & D. 702.

(5) 2 D. M. & G. 960.

Mr. *Bardswell*, for *Best's* assignee, contended that as soon as *Mackle* obtained his order of discharge the proceedings, so far as the Court of Bankruptcy was concerned, were at an end. Therefore there was no "pending business" to which the Lord Chancellor's Order could apply: *In re Carter* (1), *Ex parte Webster* (2). The only jurisdiction to order taxation now was in the Lord Chancellor or Master of the Rolls under the *Attorneys' and Solicitors' Act*, and the period of twelve months limited by the 37th section of that Act having expired, no taxation could take place without a special order made on sufficient grounds.

Mr. *W. Willis*, in reply, referred to *Ex parte Heyden* (3).

SIR G. M. GIFFARD, L.J.:—

In this case I do not think that the *Attorneys' and Solicitors' Act* has any application. The matter entirely rests upon the practice of the Court of Bankruptcy. The appeal as to the second bill, which related to business subsequent to the order of discharge, has been very properly withdrawn. As to the first bill, it is reasonable that it should be taxed by the Registrar. The 14th section of the Act of 1861 distinctly enacts that all bills of costs shall be taxed and settled by him, and it is clearly right that the assignee who is dealing with other people's money should not pay such bills until the amount has been certified by the Registrar. Costs in Bankruptcy are much in the same position as costs in a Chancery suit where there has been an order to tax them. In such a case the right of taxation would not be gone because there had been a delay of a year. In this case I am of opinion that no special order was necessary, and that the bill ought to have been taxed by the Registrar. The appeal must be allowed. The Appellant will take his costs out of *Mackle's* estate, and the Respondent will take his costs out of *Best's* estate.

Solicitors: Mr. *J. T. Miller*; Mr. *Etty*.

(1) Law Rep. 1 Ch. 170.
(2) Law Rep. 2 Ch. 556.
(3) 2 Gl. & J. 52.

L. J. G.
1870
Mar. 28.

Ex parte WIELAND.
In re WIELAND.

Bankruptcy—Second Adjudication to impeach former fraudulent Bankruptcy—Petitioning Creditor's Debt—Debt proved in former Bankruptcy—Practice—Transfer of pending Proceedings to London—Bankruptcy Act, 1869, *s.* 80.

A debtor was adjudicated bankrupt on his own petition, in December, 1869, in a County Court. A creditor who had proved under the bankruptcy filed a fresh petition for adjudication, in January, 1870, in the Court of *London*, for the purpose of impeaching the first bankruptcy, under which the debtor was a second time adjudicated bankrupt; and the Chief Judge made an order transferring the proceedings in the first bankruptcy from the County Court to *London*:—

Held (affirming the orders of *Bacon*, C.J.), first, that the creditor's debt was sufficient to support the petition for adjudication, notwithstanding it had been proved in the former bankruptcy:

Secondly, that the Chief Judge had power under the 80th section of the *Bankruptcy Act*, 1869, to transfer to the Court of *London* the proceedings in the pending bankruptcy, although they had been commenced under the Act of 1861.

THIS was an appeal from two orders of the Chief Judge in Bankruptcy.

On the 18th of March, 1869, Mr. *Barrow*, the official liquidator of the *National Savings Bank Association*, commenced an action against the bankrupt, Major *J. F. Wieland*, then residing at *St. John's Wood*, in the county of *Middlesex*, for a debt due to the association. The action was referred to a Master of the Court of Exchequer, who made his award against the bankrupt for £7730, and on the 1st of November judgment was signed for that amount with costs. The taxation of the costs was completed on the 23rd of December, 1870.

In the meantime, on the 11th of December Mr. *Scott* (an attorney) brought an action against Major *Wieland* for a bill of costs, amounting to £95, and judgment was signed in that action on the 22nd of December. On the 18th of December, *Wieland* executed a bill of sale to his brother *F. Wieland*, of all his effects at *Sillwood Place, Brighton*, where he had been staying for a short time, to secure an antecedent debt of £150. The bill of sale, which comprised in effect all his property, was registered on the 22nd of December. On the 23rd of December *Wieland* was arrested at *Bramber*, near *Lewes,* immediately on his arrival in that place, at the suit of *Scott*, and on the 24th, while in prison, filed his Petition for adjudication in the *Lewes* County Court *in formâ pauperis. Scott,* who it was alleged was acting in collusion with him, on the same day waived the notice of application for release, and the bankrupt at once obtained his release from custody and was adjudicated a bankrupt. In the Petition he was described as of *Bramber,* in the county of *Sussex,* late of *Marlborough Hill, St. John's Wood.* His debts were sworn to be £42,598, his assets to be under £300.

On the 14th of January, 1870, the first meeting of creditors was held, when Mr. *Barrow* attended and proved the debt of the company, and was appointed creditors' assignee.

On the 27th of January, 1870, Mr. *Barrow,* as such official liquidator, presented a fresh Petition under the *Bankruptcy Act,* 1869, in the Court of Bankruptcy in *London,* praying for adjudication against the bankrupt, founded upon the act of bankruptcy committed by his execution of the bill of sale; and he was adjudicated bankrupt under it on the 22nd of February, by the Chief Judge.

On the 1st of March the Chief Judge made a further order, transferring the proceedings in the first bankruptcy from the *Lewes* County Court to the *London* Court.

From both these orders the bankrupt appealed.

Mr. *Robertson Griffiths,* for the Appellant:—

With respect to the order of adjudication there was no act of bankruptcy, and no sufficient petitioner's debt; for the debt due to *Barrow* was extinguished by his proof in the first bankruptcy: *Ex parte Diack* (1); *Ex parte Chambers* (2); *Ex parte Flower* (3). There is no case reported in which a creditor who has proved under a bankruptcy has been allowed to file a Petition for a new bankruptcy before the first is superseded. The first bankruptcy was not fraudulent. It may be true that the arrest was a friendly one,

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(1) 2 Mont. & A. 675.
(2) 2 Mont. & A. 440.
(3) De G. 503.

L. J. G.
1870
Ex parte WIELAND.
In re WIELAND.

but the debt was a *bonâ fide* debt, and a friendly arrest has never been held a reason for treating a bankruptcy as fraudulent. If the bill of sale or any other of the transactions was fraudulent, the assignee might have impeached it without a fresh adjudication. With respect to the second order, the Chief Judge had no jurisdiction to transfer the proceedings to the Court of *London*. The 88th section of the Act of 1861 gives power to the Commissioner in *London* to remove proceedings from one district court to another, but not to transfer them to *London;* and the Act of 1869 has no application, because the bankruptcy was commenced before the date of the Act.

Mr. *De Gex*, Q.C., and Mr *Reed,* for the assignee :—

The first bankruptcy was clearly collusive and fraudulent ; and that being so, the proper course for a creditor to pursue was to file a fresh Petition in order to impeach what had taken place before the first adjudication : *Ex parte Taylor* (1) ; *Ex parte Roberts* (2) ; *Ex parte Louch* (3). The act of bankruptcy relied on was the bill of sale to the bankrupt's brother, and the debt due to the official liquidator was sufficient to support the Petition, notwithstanding the proof in the first bankruptcy; for the debt is still in existence, and if an action were brought on it, a plea of bankruptcy would not bar the action. The only course would be to obtain an injunction to stay it : *Malkin* v. *Adams* (4) ; *Ex parte Bonsor* (5) ; *Spencer* v. *Demett* (6).

With respect to the jurisdiction of the Chief Judge to transfer the proceedings to *London,* the 80th section of the *Bankruptcy Act,* 1869 (7), applies to all proceedings, whether commenced before the passing of the Act or subsequently. The construction of the 88th section of the Act of 1861 is therefore immaterial.

Mr. *Robertson Griffiths,* in reply.

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(1) 6 D. M. & G. 737.

(2) 3 D. F. & J. 747.

(3) De G. 463.

(4) 2 Rose, 28, 33.

(5) Ibid. 61.

(6) Law Rep. 1 Ex. 123.

(7) Sect. 80 (3). Where proceedings against a debtor are instituted in more courts than one, the London Court of Bankruptcy may, on the application of any creditor, direct the transfer of such proceedings to the London Court of Bankruptcy, or to any local bankruptcy court.

L. J. G.
1870
Ex parte WIELAND.
In re WIELAND.

SIR G. M. GIFFARD, L.J.:—

I am of opinion that there is no ground for this appeal. As to the effect of the proof of the debt in the first bankruptcy, there is no authority for holding that it would preclude the creditor from presenting a petition for a fresh adjudication. With respect to the course of proceeding in the first bankruptcy, the cases cited establish the proposition that where a bankruptcy is obtained by fraud, it is competent to a creditor to obtain a fresh adjudication for the purpose of impeaching the transactions on which the first bankruptcy was based. I think that no Court, looking at the proceedings in this case, could doubt that the first bankruptcy was a fraud. I think, therefore, that the first order was plainly right.

With respect to the jurisdiction of the Chief Judge to make the second order, I am of opinion that the 80th section of the *Bankruptcy Act*, 1869, gives power to the Chief Judge to make transfers of proceedings, not only in bankruptcies which have been commenced since the Act, but in those which had been commenced before the Act; therefore, as to this order also the appeal must be dismissed.

Solicitors: Mr. *Barrow;* Messrs. *Lewis, Munns, & Co.*

In re INTERNATIONAL CONTRACT COMPANY.

G. H. LEVITA'S CASE.

L. J. G.
1870
March 4.

Acceptance of Shares—Notice of Allotment not sent—Application through Agent.

Shares were allotted to *L.* without his knowledge, on the application of *M.* Afterwards *L.*, at *M.*'s request, sent in a formal application for the shares. No notice of allotment was sent to him. *M.* paid the deposit on the shares and received the share certificates, and also a dividend which was subsequently declared. *L.*'s name was on the register when the company was ordered to be wound up:—

Held (affirming the decision of *Stuart*, V.C.), that *L.* had constituted *M.* his agent to accept the shares, and that he was properly placed on the list as a contributory of the company.

[illegible] 84
13 Eq 32
570
[illegible] 535

THIS was an appeal from an order of Vice-Chancellor *Stuart*, made in the winding-up of the *International Contract Company, Limited.*

L. J. G.
1870
G. H. LEVITA'S CASE.

The company was formed and registered under the *Companies Act*, 1862. On the 3rd of May, 1864, Mr. *James McHenry*, who was an active promoter of the company, gave in, among other names, the name of *Gustavus Henry Levita*, of *Antwerp*, as an applicant for 350 shares, and accordingly on the same day the directors allotted that number of shares to *Levita*. The allotment letter was given to *McHenry*, and he paid the allotment money of £5 per share. *Levita's* name was placed on the register in respect of the shares. Previously to the allotment no application for shares had been made by *Levita*, but on the 4th of June he filled up and sent in a letter of application for 350 shares in the usual form. The circumstances under which this was done were stated in his affidavit in the following terms:—

"In the month of June, 1864, I received a letter from Mr. *James McHenry*, inclosing three printed forms of letters of application for shares in the above company, and requesting that I would sign one of them for 350 shares, and get my friends *A. Van Bomberger* and *C. H. Schepeler*, both of *Antwerp*, to sign the two others for 250 shares each; and I was informed by the said Mr. *McHenry* that it was a mere matter of form, and that neither I nor my friends would be troubled any more in the said matter. I had known Mr. *McHenry* for some time prior thereto, and believed him to be a person of great respectability, and having confidence in his representations, I acceded to his request by signing the first-mentioned letter, and getting my said friends also to sign the other two letters, and on the 4th of June, 1864, I transmitted them to the said Mr. *McHenry*."

He proceeded to deny that he had ever received any letter of allotment, or paid any deposit, or received any dividend on any shares in the company; or that he had authorized any person to do so on his behalf. *McHenry's* letter requesting *Levita* to sign the letter of application was not produced, having been lost.

On the 18th of August, 1864, the certificates for the 350 shares were issued. The receipt for these certificates in the company's book was signed "*C. C.*," which appeared to be the initials of a clerk of *McHenry's*, and certificates of other shares of *McHenry's* had been issued to the same person. On the 30th of

April, 1866, a dividend became payable on *Levita's* shares, but it was not paid to him, but was carried to the credit of *McHenry* in the books of the company.

In June, 1866, an order was made to wind up the company, and *Levita's* name was placed on the list of contributories for 350 shares. *Levita* applied to the Vice-Chancellor to remove his name, and the Vice-Chancellor having refused the application, it was renewed in the Court of Appeal.

Mr. *Greene*, Q.C., and Mr. *Rigby*, for the Appellant, contended that there had been no acceptance of the shares by *Levita*. He had constituted *McHenry* his agent to apply for the shares, but not to accept them; and the letter of allotment ought to have been communicated to *Levita*. He had no notice or knowledge that the shares had ever been allotted to him. The facts were very similar to those in *Robinson's Case* (1). In *Levita's Case* (2) the shareholder (who was a brother of the present Appellant), was a director of the company. [They also referred to *Gunn's Case* (3), and *Crawley's Case* (4).]

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the official liquidator, were not called on.

SIR G. M. GIFFARD, L.J.:—

The facts in this case are totally different from those in *Robinson's Case*. In May, 1864, an allotment was made to *Levita*, on the application of *McHenry*; and *McHenry* paid the deposit, and then *McHenry* wrote to *Levita* inclosing him a letter of application, which he signed and returned. He could only have signed this for the purpose of its being acted upon. His own account in his affidavit is as follows:—[His Lordship read the passage set out above, and continued:]—If that means anything, it means that he left *McHenry* to do what he pleased, trusting to *McHenry* to indemnify him. He says, "Believing him to be a person of great respectability, and having confidence in his representations, I acceded to his request." It is as clear as possible that he intended

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(1) Law Rep. 4 Ch. 322.

(2) Ibid. 3 Ch. 36.

(3) Law Rep. 3 Ch. 40.

(4) Ibid. 4 Ch. 322.

L. J. G.
1870
G. H. Levita's Case.

McHenry to be his agent for all purposes. He must therefore abide the consequences. I am of opinion that his name has been properly placed on the list of contributories, and his application must therefore be dismissed with costs.

Solicitors: Messrs. *J. & C. Cole;* Messrs. *Lewis, Munns, & Co.*

L. J. G.
1870
March 4.

In re UNIVERSAL BANKING CORPORATION.

Ex parte STRANG.

Company—Winding-up—Bankrupt Contributory—Creditors' Deed—Set-off—Assignee of Debt—Bankrupt Law Consolidation Act, 1849, *s.* 171—*Companies Act,* 1862, *s.* 101—*Balance Order.*

12 Ch.D. 756-7

Where a contributory, who is also a creditor of a company which is being wound up, becomes bankrupt or executes a creditors' deed under the *Bankruptcy Act,* 1861, after the commencement of the winding-up, the debt must be set off against the calls, whether the claim be made in the bankruptcy or in the winding-up. And if the contributory had before his bankruptcy assigned his debt to a third party, the assignee will stand in the same position as the contributory would have done as to the right of set-off.

The decision of *Stuart,* V.C., reversed.

THERE were two appeals in this case from orders of Vice-Chancellor *Stuart* made in the winding-up of the *Universal Banking Corporation, Limited.*

Henry Williams Mackreth held 340 shares in the company of £10 each, on which £2 10*s.* per share was paid previous to the commencement of the winding-up, leaving £2550 due upon them for uncalled capital.

Mackreth was also a creditor of the company to the amount of £8947 6*s.* 2*d.*

On the 22nd of June, 1866, an order was made for winding-up the company.

On the 20th of December, 1866, *Mackreth* assigned his debt due from the company to *William Strang.*

On the 26th of October, 1867, *Mackreth* executed a deed of composition with his creditors, under which he agreed to pay them 1*s.* in the pound, by two instalments, on the 1st of March and the

1st of September, 1868. The deed contained a clause that the estate should be wound up as if in bankruptcy. The deed, having been duly assented to, was registered under the *Bankruptcy Act*, 1861.

The liability of *Mackreth* for his future calls was included in the schedule annexed to the deed.

On the 16th of August, 1868, *Mackreth* tendered to the official liquidator £127 10*s.* as the full composition for the calls on his shares, but the official liquidator refused to accept the payment.

On the 16th of January, 1869, the official liquidator having previously declared a call on the contributories for the full amount of their shares, issued a balance order upon *Mackreth* for the entire nominal amount of his shares—namely, £3400. This order was varied by the Vice-Chancellor on the 31st of January, who directed *Mackreth* to pay £2550, being the balance after allowing for the calls which had already been paid to the official liquidator, and from this order *Mackreth* appealed.

On the same day the Vice-Chancellor made an order directing that *William Strang* should be at liberty to go in and prove under the winding-up for the difference between the debt of £8947 6*s.* 2*d.* due to him from the company and what was due from *Mackreth* in respect of calls on his shares. And it was further ordered that no dividend should be paid to *Strang* in respect of the debt of £8947 6*s.* 2*d.* until the full amount of such calls should have been paid. From the latter clause of this order *Strang* appealed.

Mr. *Dickinson*, Q.C., and Mr. *Bathurst*, for the Appellant:—

The effect of the creditors' deed being the same as a bankruptcy, the mutual credit clause in the Bankruptcy Act, 1849 (sect. 171), applies to the case, and the debt due to the contributory must be set-off against his calls; and it makes no difference whether the proceedings are taken in bankruptcy or under the winding-up. This has been expressly decided in *In re Duckworth* (1), and *Carralli and Haggard's Claim* (2).

The official liquidator took a wrong step in issuing a balance order against *Mackreth*. He ought to have allowed the debts to be set off against one another under the winding-up, and to have allowed *Strang* dividends on the balance. There can be no balance order after a creditors' deed, future calls being proveable under it: *Mitchell's Case* (1).

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(1) Law Rep. 2 Ch. 578.

(2) Law Rep. 4 Ch. 174.

Strang stands in no different position to *Mackreth.* He took the assignment of his debt subject to all the equities.

Mr. *Greene,* Q.C., and Mr. *Brooksbank,* for the official liquidator:—

If the set-off is allowed in this case it will create an inequality among the creditors of the company; for we shall be paying *Strang* 20*s.* in the pound, and the other creditors may only get a small dividend. The uncalled capital of the company is the principal part of the assets of the company, and we shall not be obeying the directions of the Act in collecting the assets if any part is allowed to be set off.

SIR G. M. GIFFARD, L.J.:—

I think the Vice-Chancellor's order must be reversed in both cases. In *In re Duckworth* (2) the application was in bankruptcy, because the balance was the other way, the debt due from the contributory being greater than that due from the company. But the principle is stated broadly by Lord *Cairns* in that case as follows (3): "Whether this was sufficiently attended to in the preparation of the Act of 1862 is not for our consideration, and we must hold that there is nothing in the Act of 1862 to interfere with the provisions of the 171st section of the Act of 1849." So then we get rid of the Act of 1862, and the result is that the 171st section of the Bankruptcy Act, 1849, applies in both cases, whichever way the balance may be, and whether application is made in bankruptcy or in the winding-up. This is clearly a case of set-off. Both orders must be discharged, and a dividend must be paid to *Strang* on the balance.

Solicitors: Mr. *J. Rae;* Mr. *J. Pulbrook.*

(1) Law Rep. 5 Ch. 400.
(2) Law Rep. 2 Ch. 578.
(3) Law Rep. 2 Ch. 581.

BOVILL *v.* COWAN.

L. J. G.
1870
March 21.

Practice—Affidavit as to Documents—Sufficiency—Joint Ownership.

Where a party to a suit is required to make an affidavit as to documents in his possession, and alleges in his affidavit as a reason for not producing them that they are in the possession of himself and a third person as joint owners, he is bound to state the nature of the joint ownership.

Order of the Master of the Rolls affirmed.

7Ch 192
14 Lj 5d
10 QBD

THIS was an appeal from an order of the Master of the Rolls.

The Plaintiffs in the suit, which was instituted to restrain the Defendants from violating the Plaintiffs' patent, were ordered "to make and file a full and sufficient affidavit, stating whether they, or either of them, have or have had, or has or has had, in their or either of their possession or power, any and what licenses or agreements, or duplicates or drafts or copies of licenses or agreements, granted or entered into by the late Plaintiff, *George H. Bovill*, deceased, to and with any person or persons for or relating to the use by any person or persons of the improvements patented by the late Plaintiff in June, 1849, and accounting for the same," for the purpose of production to the Defendants.

The Plaintiffs accordingly filed an affidavit in the following terms:—

"According to the best of our knowledge, information, and belief, we have not now, and never have had, in our exclusive possession, custody, or power, or in the possession, custody, or power of our solicitors or agents, or solicitor or agent, or in the possession, custody, or power of any other persons on our behalf, any license, duplicate license, or agreement for the use of the patent of June, 1849, or any copies of such documents; but we have in our possession, jointly with a third person, who is not a party to this suit, a bundle of such documents, numbered in red ink from 1 to 240, both inclusive; and we can only produce the said documents with the consent of such third person, in whose possession jointly with us the said documents now are; and we have applied for such consent accordingly, and if accorded we have no objection to produce the said documents."

This affidavit was objected to by the Defendants as insufficient, and the Plaintiffs were ordered by the Court to file a fresh affidavit. They accordingly filed one to the following effect:—

"We say that we have set forth in the schedulé hereto the particulars of the bundle of documents, numbered 1 to 240 inclusive, referred to in our affidavit filed in this cause on the, &c.; and we further say that Mr. *John Lockett* of, &c., is the person referred to in the said affidavit in whose joint ownership the said documents are." Then followed a schedule of the 240 documents referred to.

The Defendants objected to the sufficiency of this further affidavit, on the ground that it did not state in what manner and when Mr. *Lockett*, who was no party to the suit, acquired an interest in the licenses, nor the nature of his interest, so as to enable the Court to determine whether, notwithstanding his interest in them, the Court would order the Plaintiffs to produce them. The Master of the Rolls considered the affidavit insufficient, and ordered the Plaintiffs to file a fresh one, and the Plaintiffs appealed from his decision.

Sir *R. Baggallay*, Q.C., and Mr. *Everitt*, for the Appellants, contended that the affidavits taken together were sufficient. The first affidavit distinctly asserted joint ownership in Mr. *Lockett*, which implied an interest in the documents, and negatived the notion of his being a mere depositee. In the earlier part of the affidavit it was distinctly denied that any documents were in the possession of any person as the Plaintiffs' agent. [They referred to *Burbidge* v. *Robinson* (1); *Nicholl* v. *Jones* (2).]

Mr. *Jessel*, Q.C., and Mr. *North*, for the Defendants, were not called on.

Sir G. M. Giffard, L.J.:—

I think the Plaintiffs must file a fresh affidavit. It is sufficient to say that when parties make an affidavit they are bound to make it distinct in its terms. If they allege joint ownership, they ought to shew, in such a manner as to satisfy the Court, what is the nature of such joint ownership. The appeal must be dismissed with costs.

Solicitors: Messrs. *Harrison, Beal, & Harrison*; Mr. *W. W. Wynne.*

(1) 2 Mac. & G. 244. (2) 2 H. & M. 588.

CHICHESTER *v.* MARQUIS OF DONEGALL.

L. J. G.
1870
March 18.

1 Ch D. 559
6 Ch D. 61
616

Production of Deed by Mortgagee—Inspection of Part of a Deed—Exceptions.

By a deed of settlement a general power of appointment over certain estates was reserved to the settlors, subject to which, the estates were limited to the settlors for their lives, with remainders to other persons in strict settlement. The settlors executed their power of appointment by mortgaging the estates:—

Held, that the mortgagees could not, in a suit for redemption brought by one of the remaindermen, be ordered to produce the deed of settlement or to give any discovery as to it.

Orders of *James*, V.C., discharged.

BY an indenture of settlement, dated the 23rd of July, 1851, the Marquis of *Donegall* and his son the Earl of *Belfast* appointed and conveyed certain manors, lands, and hereditaments, subject to certain mortgage charges, to such uses as the Marquis and the Earl should jointly appoint, and in default of appointment to the use of the Marquis for his life, in confirmation of a previous life estate; with remainder to the use of the Earl for his life; with remainder to his first and other sons successively in tail male; with remainder to *J. H. R. Chichester*, for a term of years upon the trusts therein mentioned; with remainder to Lord *Edward Chichester* for his life; with remainder to *George A. H. Chichester* (the Plaintiff in this suit), for his life; with remainder to his first and other sons successively in tail male, with divers remainders over.

By an indenture of mortgage, dated the 5th of May, 1852, the manors, lands, and hereditaments comprised in the above-mentioned indenture of settlement were, by virtue of the power of appointment therein contained, appointed and assured by the Marquis and the Earl to *Robert Hildyard*, his heirs and assigns, by way of mortgage to secure the sum of £5000 and interest.

The Earl of *Belfast* died in 1855, without having been married.

In 1868 the Plaintiff, *G. A. H. Chichester*, filed the bill in this suit originally against the Marquis of *Donegall*, Lord *E. Chichester*, and *J. H. R. Chichester;* and after certain proceedings, which failed to produce discovery of the settlement of 1851 (in the course of which exceptions to the answer of the Marquis were allowed (1))

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(1) Law Rep. 4 Ch. 416.

L. J. G.
1870
CHICHESTER
v.
MARQUIS OF
DONEGALL.

the bill was amended by adding as Defendants *J. R. W. Hildyard* and *R. Ingham,* the executors and devisees of *R. Hildyard,* then deceased; and after stating as above stated, and that *J. R. W. Hildyard* and *R. Ingham,* acting in collusion with the Marquis of *Donegall,* refused to produce the indenture of settlement of 1851, prayed an account of what was due to *J. R. W. Hildyard* and *R. Ingham,* and that on payment they should be ordered to transfer the mortgaged premises and to deliver up the deeds; and that they might be ordered to produce the settlement and other documents in their possession.

Two of the interrogatories to the amended bill were as follows:

7. "Was not some and what indenture of re-settlement . . . and whether or not bearing date the 23rd of July, 1851, or of what date . . . duly made . . . ?"

8. "Set forth the date, particulars, names, and material contents of the said indenture of the 23rd of July, 1851 . . ."

The Defendants *Hildyard* and *Ingham,* by their answer, admitted that some such deeds as those mentioned in the bill had been made, but said that the deeds were muniments of title, and were in their possession as mortgagees, and declined to produce them or to state the purport and effect thereof, further than by giving the date of the mortgage deed above mentioned, and the dates of two subsequent mortgage deeds, and the sums due thereon, amounting together to £120,000. This answer did not admit the Plaintiff's right to redeem.

To this answer the Plaintiff excepted for insufficiency, and the Vice-Chancellor *James,* on the 8th of December, 1869, overruled some exceptions, but allowed the exceptions to the 7th and 8th interrogatories (1).

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(1) 1869. Dec. 8. 4R/1849/252 SIR W. M. JAMES, V.C. :—

This is, according to my notion of the law, a very plain case indeed.

I cannot understand that there is any magic in the terms of a mortgage which gives to the mortgagee any better right than that of any other purchaser for valuable consideration.

Of course, under his contract as between him and the mortgagor, he has some special rights. One of the rights between the mortgagor and the mortgagee is, that the mortgagor cannot ask the mortgagee to produce the deeds until he pays him his principal, interest, and costs.

But it cannot be admitted that a man by creating a mortgage, any more than by creating a lease, can interfere with the right of another person who has a right against him for production of his deeds.

The Defendants then put in a further answer, saying that they claimed as mortgagees under the deeds above mentioned, and that the deeds were made in exercise of powers reserved to the Marquis and Earl; and the Defendants admitted that the Plaintiff was entitled to redeem, and they submitted to be redeemed.

The Plaintiff set down the old exceptions as exceptions to this answer, and took out a summons for production of the deed of settlement of 1851; and the Vice-Chancellor *James* allowed the exceptions, and made an order for production of the deed; the Defendants to be at liberty to seal up the deed, except such parts thereof as, according to an affidavit to be made by them, related to the parcels and to the limitations in favour of the Plaintiff (1).

The mortgagees moved, by way of appeal, to discharge the order for production, and presented a Petition of appeal against the order allowing the exceptions. The Plaintiff had become bankrupt since the first exceptions were allowed, and his assignee had been by a supplemental order joined as Plaintiff.

The motion upon appeal came on for hearing, and, by consent,

In this particular case what the Plaintiff says is: "There is a deed in existence by which an estate was limited to me. I do not now ask to see the deed, but" (it comes to exactly the same thing in principle) "I ask you whether there is not a deed in your possession by which that estate is limited to me." It appears to me that a man is bound to answer that; that is to say, he is bound to answer as to the existence of the deed which created an interest in the Plaintiff. He is not bound to answer any question as to any other deed. The Plaintiff has no right at all to interfere with the mortgagee's title-deeds—that is to say, the title to the estate, or any of the deeds creating an estate in the mortgagee afterwards, which the mortgagee will prove if it be necessary for him to do so. But the Plaintiff has an interest in this particular deed which, to the extent to which it conveys an interest to him, is part of his property. The mortgagee took with the knowledge that the Plaintiff had an interest in it; and the Plaintiff has a right to the production of that deed to the extent of that interest.

(1) 1870. Feb. 21.

SIR W. M. JAMES, V.C.:—

As a matter of course this deed must be produced—subject to this, that any portion of it which does not relate to the Plaintiff's interest and to the parcels may be sealed up.

I do not understand the reason for all this fighting against the rules of the Court.

There must be the ordinary order for production and inspection at the office of the Defendants' solicitors, with liberty to seal up the deed, except so far as it relates to the interest of the Plaintiff, and to the parcels.

L. J. G.
1870

CHICHESTER
v.
MARQUIS OF
DONEGALL.

the appeal against the order allowing the exceptions was heard at the same time.

Mr. *Amphlett*, Q.C., and Mr. *Cookson*, for the Appellants:—

These Defendants are mortgagees claiming under this deed, and do not want to shew it in order to enable the Plaintiff to find flaws in it. They are trustees, and are bound not to expose their estate to risk. The deed is not impeached in this suit, and these Defendants have a right to refuse to shew it. Neither the Marquis nor the Earl could call for inspection of this deed, and the Plaintiff who claims under them can be in no better position. A mortgagee cannot claim to see the mortgage deed, and the Plaintiff is in the same position as if the mortgage deed had been included in this deed. If the Plaintiff claimed before the mortgagees, it would be different, but his claim is subsequent to the mortgage. If a mortgagor sells or settles the equity of redemption, those who claim under him have no right to see the deeds in the possession of the mortgagee. If these estates had been sold to a stranger under this power, it could not be contended that the Plaintiff would have a right to see the deeds; and a mortgagee is a purchaser *pro tanto*, and has, as mortgagee, even higher rights as regards the production of deeds than an ordinary purchaser. A mortgagee can only be compelled to produce deeds, first, where fraud is charged, as in *Kennedy* v. *Green* (1); secondly, when the deed is referred to in the answer, so as to make it part of the answer, as in *Latimer* v. *Neate* (2); thirdly, where the mortgagor has been bankrupt, and his creditors are availing themselves of the extraordinary powers given by the bankruptcy statutes. It may seem hard that a mortgagor may not see the parcels, and know what is included, but that is certainly the rule: *Crisp* v. *Platel* (3); *Jones* v. *Jones* (4); and *Browne* v. *Lockhart* (5). The only case to the contrary is *Patch* v. *Ward* (6), but that was a very peculiar case. *Addison* v. *Walker* (7) is to the same effect. It is true that the mortgagee of a lessee has been obliged to produce the lease: *Balls* v. *Margrave* (8);

(1) 6 Sim. 6.
(2) 4 Cl. & F. 570.
(3) 8 Beav. 62.
(4) Kay, App. vi.
(5) 10 Sim. 420.
(6) Law Rep. 1 Eq. 436. / 17 Jur 452
(7) 4 Y. & C. Ex. 442.
(8) 3 Beav. 448.

but, of course, the mortgagee can be in no better position than his mortgagor; and, moreover, that was a peculiar case, as there was no counterpart of the lease. The sole object of reserving these powers in a settlement is to enable the settlors to create a mortgage without troubling the mortgagee with the subsequent devolution of the estate; and if such a deed must be produced, the practice of conveyancers must be changed, and in every such case two deeds, instead of one, must be used, or else the mortgagee will be obliged to examine the subsequent title.

Mr. *Freeling*, for the Plaintiff:—

This is not the common case of mortgagor and mortgagee. Here the Plaintiff and his family claim the estate under these limitations, and wish to know what they are. If an owner in fee had mortgaged, and then made a settlement, and the deed of settlement had got into the hands of the mortgagee, production would be compelled. All persons claiming under a deed must have a right to see that deed, and it can make no difference that a mortgage deed happens to be on the same piece of parchment. If there had been a sale under the power, of course the Plaintiff would have nothing more to do with the property or the deed; but this is only a mortgage, and the Plaintiff has still his estate in remainder. We do not ask to see anything by which we could impeach this mortgage, and the Plaintiff, as well as the mortgagees, claim under this deed. Before the mortgage was made, the Plaintiff might have compelled the Marquis and the Earl to produce the deed, and their appointees can be in no better position: *Glover* v. *Hall* (1). The deed, so far as the production is ordered, is not evidence of the title of the mortgagee, but of the title of the Plaintiff: *Addison* v. *Walker* (2) goes too far, and cannot be relied upon. *Lady Shaftsbury* v. *Arrowsmith* (3) is an authority for the production.

SIR G. M. GIFFARD, L.J.:—

The rule which protects a mortgagee from producing deeds is of considerable importance, and the question in this case really is whether the circumstances make it an exception to the

(1) 2 Ph. 484.

(2) 4 Y. & C. Ex. 442.

(3) 4 Ves. 66.

L. J. G.
1870
CHICHESTER
v.
MARQUIS OF
DONEGALL.

rule. The bill is an ordinary bill for the purpose of redemption, and the mortgagee admits, by his answer, that the Plaintiff is entitled to redeem, but refuses to produce certain deeds. The reply of the Plaintiff is that there was a settlement under which he is entitled to an interest in the estate. That settlement contained a power to the Marquis of *Donegall* and his son to mortgage, under which power the Defendants claim; and I do not think it possible to put the matter higher than if it had been the case of an original mortgage, by which an equity of redemption had been reserved to several persons, all claiming through the mortgagor. Can there be any ground on which the production of such a deed would be held to form an exception to the rule?

6 Ch. D. 614
616

I take the rule of the Court, right or wrong, to be that, if a mortgagor executes a mortgage, and hands over the title-deeds, he cannot see those title-deeds, after the mortgage has become absolute, without paying the mortgagee his principal, interest, and costs.

That being so, I can see no reason why the ordinary rule of the Court should be departed from in this case, and certainly, if there is any reason for shewing anything, I cannot see why the whole deed should not be shewn. I take the rule to be that, as between mortgagor and mortgagee, the right time for redemption being passed, and the mortgage not being impugned, if the Plaintiff wants to see the mortgage deed, his title to redeem being admitted, he must pay the principal, interest, and costs, or go on to get his redemption decree.

The result is, that the order for production must be discharged, and the exceptions overruled. The costs in the Court below to be paid by the Plaintiff. No costs of the appeal.

Solicitor for the Plaintiff: Mr. *C. Appleyard.*

Solicitors for the Defendants: Messrs. *Cookson, Wainewright, & Co.*

ATTORNEY-GENERAL *v.* WAX CHANDLERS' COMPANY.

L. C.
1869
Dec. 22.
1870
Jan. 14, 21;
March 9.

Charitable Devise—Gift for Purpose not exhausting the whole Income—Surplus.

A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers* "for this intent and purpose, and upon this condition," that they should yearly distribute £8 after the manner following: that is to say, sums amounting to £7 15*s.* to charities; and the other 5*s.* to the Master and Wardens for the time being equally; and the rest of the profits he willed should be bestowed upon the reparations of the houses and tenements; and if the Master, Wardens, and Commonalty should leave any of these things undone, then he willed that his next of kin should enter into the tenements, and hold unto him and his heirs for ever, upon condition that he and they and every of them do all these things. At or shortly before the date of the devise the annual income of the property was £9 4*s.*; but it subsequently became much greater:—

Held (affirming the decision of the Master of the Rolls), that the Master, Wardens, and Commonalty were entitled to the whole surplus, after payment of £7 15*s.* yearly, for their own benefit.

11 Eq 359
10-1

6 Ch 512-3
516, 7, 5

Reversed LR 6 HL 1.

THIS was an appeal from a decree of the Master of the Rolls (1).

William Kendall, by his will, dated the 31st of January, 1558, disposed in the first place of his personal estate by making specific bequests of certain leaseholds, and bequeathing certain legacies, including, among others, one in the terms following:—"Item, I will there shall be geven at the daye of my buriall to my *Company of the Waxe Channdlers* for their recreacon twentie shillings." The will then proceeded as follows:—"This is the testament and last will of me, *William Kendall*, of *London*, cittizen and wax channdeler, of all my landes, tents, and hereditamts in *London*, *Kent*, and elsewhere in *England*. First, I will and give unto my sonne *William* all my landes and tenements in the pishe of *Bexley*, in the countie of *Kent*, upon condicon that he paye yerely unto *John Kendall*, my brother, twentie shillings by the yere, to have and to holde the said lands and tenements unto the said *William Kendall*, and to the heires of his body lawfully begotten, and for default of such heires, I will that my sister *Julian* shall have the said landes and tenements to her and to t'heires of her body lawfully

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(1) Law Rep. 8 Eq. 452.

L. C.
1869–70
ATTORNEY-GENERAL
v.
WAX CHANDLERS' COMPANY.

begotten upon condicon before rehearsed. Also, I give unto *William Kendall*, my sonne, all my houses and tents in the *Olde Channge*, in the pishe of *Marie Magdalenes*, in *London*, at *Old Fish Strete* end, to have and to hold unto the said *William* and to the heires of his body lawfully begotten, and for default of such issewe, I will that the Master, Wardens, and Comonaltie of the *Misterie of the Waxe Channdlers* of the Citie of *London*, and theire successors, shall have the said howsinges and tenements for this entent and porpose, and upon this condicon, that they shall yerely distribute eight pounds of lawful money of *England* after this manner, that is to say, to the poore inhabitants of the parishe of *Mary Magdalenes* aforesaid at *Old Fish Strete* ende, fower pounds lackying twoo shillings in gownes for men and women, and cooles, at the discrecon of the churchewardens of the said parishe to be given and deliverid unto the said poore inhabitants in the moneth of December yerely, and the said twoo shillings to the churchewardens of the same parishe for their paynes taking, and to distribute yerely to the poore inhabitants of the parishe of *Bexlie*, in the countie of *Kent*, thirtie and eight shillings of good and lawfull money of *England*, to be geven and deliverid yerely aboute the third and fourth dayes of November yearely by the discretion of the churchewardens and chiefe inhabitants of the said parishe of *Bexlie* then beying, and twoo shillings to the churchewardins of the said parishe of *Bexlie* for their great paynes, and thirtie and five shillings to be distributed unto the poorest men and women of the *Companie and Misterie of Waxe Channdelers* of *London*, and the other 5 shillings to be distributed to the Master and Wardens of the *Waxe Channdelers* for the time being equallie, and the reste of the profits of the said houses and tenements I will shall be bestowed upon the reparacons of the said houses and tenements. And yf the Master, Wardens, and Comonalltye of the *Misterie of Wax Channdlers* of *London*, and their successors, shall leave any of these things ondonne above rehersed, then I will that the next of kynrid unto to me the said *William* shall enter unto the said tenements, and them have and holde unto him and unto his heires for ever upon condicon that he and they and every of them do all these things above rehersed in all poynts as yt is above rehersed by me *William Kendall*."

L. C.
1869-70

ATTORNEY-GENERAL
v.
WAX CHANDLERS' COMPANY.

The testator died on the 21st of February following the date of his will. His son died without issue in November, 1563, and thereupon the *Wax Chandlers' Company* took possession of the real estate in *London* devised by the will, and had ever since continued in possession thereof. At or shortly before the testator's death the annual value of the property appeared to have been £9 4*s.*; at the time when the company took possession the clear annual value was £16, and the present annual value was £330. The company had out of the income regularly paid the several sums mentioned in the testator's will, amounting to £7 15*s.*, and appropriated the whole of the remainder to their own benefit.

In 1790 the company bought for £350 a small piece of land, which was surrounded by the land comprised in the devise to *William Kendall.* The money for the purchase was advanced by one of the members of the company, and was repaid to him out of the general income and assets of the company. The site of the premises so purchased had since been thrown into and united with the site of the property devised by the will of *William Kendall*, and houses had been built on the two sites in such a manner as to obliterate the boundaries between them, and render it impossible to distinguish one property from the other.

In 1867 an *ex-officio* information was filed by the Attorney-General against the company, praying for a declaration that the Defendants were not entitled, for their own benefit, to the whole income of the property devised by the will of *William Kendall*, subject to an annual charge of £7 15*s.*, but that the Defendants were trustees of the said property and of the whole income thereof for charitable purposes, subject to the specific payment of 5*s.* annually by the said will given to the Master and Wardens, and to such increased allowance (if any) as might be proper to be made in respect of such last-mentioned specific payment: for a declaration that the small piece of land purchased in 1790 was subject to the trusts of the will, and formed part of the property of the charity, and for relief on the footing of these declarations. The Master of the Rolls held that the Master, Wardens, and Commonalty were entitled to the whole surplus after payment of £7 15*s.* yearly, for the benefit of the corporation, and accordingly dismissed the information.

L. C.
1869-70
ATTORNEY-GENERAL
v.
WAX CHANDLERS' COMPANY.

From this decree the Attorney-General appealed. The arguments were substantially the same as those used in the Court below, and which are stated in the previous report.

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Vaughan Hawkins*, for the Attorney-General, contended that as to the property comprised in *William Kendall's* devise, the whole surplus income was given for repairs, which at the time of the testator's death would not be more than was required, and, consequently, there was no presumption of any intention to benefit the Defendants, but the whole fund was dedicated to charity. The property was given upon trust, not upon condition, and the gift over was merely *in terrorem*, for it was an object of ambition to the City companies to administer charitable funds.

They cited the following cases: *Arnold* v. *Attorney-General* (1); *Attorney-General* v. *Drapers' Company* (2); *Attorney-General* v. *Coopers' Company* (3); *Attorney-General* v. *Mayor of Coventry* (4); *Attorney-General* v. *Earl of Winchelsea* (5); *Mercers' Company* v. *Attorney-General* (6); *Attorney-General* v. *Drapers' Company* (7); *Wright* v. *Wilkin* (8); *Christ's Hospital* v. *Grainger* (9).

With respect to the land purchased in 1790, they contended that by the act of the Defendants it had become so mingled with the trust property that it was impossible to identify it, and it must be considered to have been added to the charity property: *White* v. *Wakley* (10).

Sir *R. Baggallay*, Q.C., and Mr. *C. Browne*, for the Defendants, argued that the gift did not exhaust the whole income at the date of the will, and that there was no intention manifested to devote the whole income to charity; therefore it must be taken that the testator's object was to benefit the Defendants. They referred to *Thetford School Case* (11); *Attorney-General* v. *Mayor of Bristol* (12); *Attorney-General* v. *Skinners' Company* (13); *Mayor of Beverley* v.

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(1) Show. P. C. 22; Duke's Charitable Uses, 591.
(2) 2 Beav. 508.
(3) 3 Beav. 29.
(4) 2 Vern. 397.
(5) 3 Bro. C. C. 373.
(6) 2 Bli. (N.S.), 165.
(7) 4 Beav. 67.
(8) 2 B. & S. 232. 9 Jur. N.S. 715.
(9) 1 Mac. & G. 460.
(10) 26 Beav. 17. 4 Jur. N.S. 986
(11) 8 Rep. 130 b.
(12) 2 Jac. & W. 294; 3 Madd. 319.
(13) 2 Russ. 407.

Attorney-General (1); *Mayor of Southmolton* v. *Attorney-General* (2); *Attorney-General* v. *Jesus College, Oxford* (3); *Attorney-General* v. *Cordwainers' Company* (4); *Attorney-General* v. *Grocers' Company* (5).

They also contended, that if the Court should be of opinion that the corporation was not entitled to the surplus income of the devised property, the rents of the newly-acquired property might be apportioned.

Mr. *Jessel*, in reply, referred to *Attorney-General* v. *Mayor of Exeter* (6).

1870

March 9. LORD HATHERLEY, L.C.:—

This case was ably argued by counsel on both sides. There are some points in it which have caused me to distinguish it from most of the cases, numerous as they are, which have been decided with reference to the rights of persons in a corporate character similar to that of the Defendants in the present instance, to whom property is given with certain special directions as to charity, and with a silence as regards what is to be done with any surplus that may remain. I say "a silence" as to what should be done with any surplus, not forgetting, of course, the main point which has been raised in the controversy here, namely, whether or not the whole and entire surplus has been devoted to charity by the peculiar words which occur in the will with reference to the rents, after certain specific charges have been satisfied which have been created on the property.

Now the will, the subject of discussion in this case, is in these words: [His Lordship read the will, and continued:—]

The first controversy that has been raised in the argument has been this, whether or not there is such a trust created as necessarily to oust, even independently of the direction with reference to the residue of the rents and profits, the whole beneficial interest of the persons who are the first takers under those words, "for this intent and purpose," coupled as the expression is with the word

(1) 6 H. L. C. 310. 3 Jur. N.S. 871
(2) 5 H. L. C. 1. 10 Jur. 435
(3) 29 Beav. 163.
(4) 3 My. & K. 534.
(5) 6 Beav. 526.
(6) Jac. 443.

L. C.
1870

ATTORNEY-GENERAL
v.
WAX CHANDLERS' COMPANY.

"condition." I think a great deal of learning has been exhausted upon this subject, and not, I am afraid, to any good purpose or effect, if one regard the whole scope and object of this will. It has certainly not been the habit of the Courts, including the highest Court, the House of Lords, to dwell very strictly upon words of that description, as indicating in themselves a disposition on the part of the testator that the property should be held so absolutely in trust that no beneficial interest could accrue to the first taker. And I might, as an instance of that, cite a case (I believe one of the latest cases upon the subject) of *Mayor of Beverley* v. *Attorney-General* (1), where the words were so strong that probably, had they occurred in any other case than that of a charitable gift to a corporate body, it might have been held that no beneficial interest could have been vested in the first taker of the property. The words of the will in that case were these: "I do give and bequeath the farm called *Silliards*, with all the said lands and appurtenances thereto belonging, to the mayor, aldermen, and burgesses of the town of *Beverley*, *Yorkshire*, wherein I was born, and to their successors for ever; nevertheless, in and with this trust and confidence in them reposed, that they, their successors and assigns, shall employ the yearly rent of the said farm, with the lands and appurtenances, in manner and form following, and not otherwise." Having left a very small surplus, something like £7, out of a rental of £40, to a particular purpose, he proceeded to say that when certain taxes, which were at that time imposed by the Commonwealth with reference to their armies, which then were being maintained in the field, were increased, so that the mayor and corporation should be unable to pay them out of this sum set apart for that purpose, then certain property which was given to some other persons should contribute; in other words, that the gifts, some of them being to charities, and some to individuals, should be diminished. Under all the circumstances of that case, the Court held that the surplus funds, which were very considerable, went to the corporation, as the first takers.

The rules, however, applicable to cases of this sort are clearly and precisely laid down, with his usual accuracy, by Lord *St. Leonards* in *Mayor of Southmolton* v. *Attorney-General* (2), which

(1) 6 H. L. C. 310. 3 Jur. N S. 71

(2) 5 H. L. C. 1. [illegible]

was decided shortly before the *Beverley Case.* In his address to the House (1), he says this: "As regards the law, if the rents of the estate are given, they represent the estate. If the rents are given in certain proportions, so as to exhaust the whole of the present rents, and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions; and if the rents increase, each recipient will have his proportion increased accordingly. And, on the other hand, as a consequence of that, if the rents decrease, every man's proportion will decrease in the same ratio. No man can take a benefit under that rule who will not be subject to a burthen; and if, therefore, the estate is doled out by a gift of portions of the rents which represent the estate, as the increase will go to the parties in the same proportion, so the decrease must be borne by them in the like proportion." That is one class of cases, and that doctrine does not apply to the case which is before me, for reasons that I shall presently give. Then he says: "If there is, as in the second class of cases, a dedication of the estate to a charity by a clear intention expressed or implied from what is stated in the will, then the whole estate must go to the charity, although the entire rents are not disposed of specifically." That is to say, if a testator says, as was said in *Mercers' Company* v. *Attorney-General* (2), "I give all these rents, and all my accruing rents, to the *Mercers' Company,* in order that they may apply all those rents and all future rents in such and such manner," and then having plainly indicated that the charity should take at all events, that rule will apply. The *Mercers' Company,* I think, had 9*s.* remaining out of the total rents. It was there said that the charity and the *Mercers' Company* should take the whole estate between them. That was a case, apparently, partly depending upon the first rule and partly upon the second. There the House held that there was a distinct dedication of the whole amount to the charity there mentioned, because the testator had expressly dedicated it to the purpose. Then there comes a third class of cases. Lord *St. Leonards* goes on to say: "The cases of the third class are a little difficult, and they have sprung mostly, no doubt, out of the *obiter dictum* in the *Thetford School Case* (3). For

(1) 5 H. L. C. 31, 32, 33. (2) 2 Bl. (N. S.) 165. (3) 8 Rep. 130 b.

10 Jur 446,

L. C.
1870

ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

instance, take any of those modern cases which have been referred to, in which, in point of fact, there was no gift of the residue, but a gift to a particular body, a college for example, for the benefit of that college, and to certain persons belonging to that college, or to certain poor persons, the objects, *ultrà* the college, being confined to particular sums and persons named. In such cases the question has arisen, What is the meaning of that? It is a gift to the college and to the particular objects. Suppose, for example, the bursars are to have £10 a year given to them—the rents have increased greatly—are they not to take any increase, in the like proportion with reference to the original gift, with the body of the college?" Then he makes this important observation, which is undoubtedly borne out by the cases: "After a considerable struggle with the Court below, the Court of Appeal has, in every instance, confined the particular objects to the sums specifically given, and left the bulk of the property with the full increase to the body to whom no particular sum was given. So that in all these cases, there being no gift of the residue, as residue, but only a gift of the property to the body, the whole residue has been held to vest, however large it has become, in the college, for example, and without any right to any increase on the part of the particular objects of the bounty of the testator. I asked the learned counsel, who was addressing the House on the part of the Respondent, what would be the consequence in this case if there was no gift of the residue? He endeavoured to make out that, in that case, there would be, of course, the same consequence. But the cases clearly establish"—he is referring there to the case of *Attorney-General* v. *Mayor of Bristol* (1)—"that if, in this case, there had been no gift of the residue—if there had been perfect silence respecting it—the corporation would have taken the whole of the property subject to the particular appropriation. That, I apprehend, admits of no doubt."

I have to see into which of those two classes of cases to which I have referred the case now before me falls. I have to determine whether or not I have specific gifts, given to specific objects, and of specific amounts, and the rest vested in the corporation upon a condition to make certain payments, and on the condition, as appears from the last passage in the will, of keeping the premises in repair, and subject to that with no other express declaration made, or whether there is an express devotion of the whole to charity.

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(1) 2 Jac. & W. 294.

Now, at first I was, I confess, a good deal struck with the argument which was very ingeniously and ably brought forward as to the residue. Setting aside for the moment the words "for the intent and purpose," and "upon condition," upon which I lay no great stress, the argument as to the residue was this: It was said, "The testator has disposed of the whole residue, for he has given £8 to these poor people, and the residue he has bestowed on the reparation of the houses and tenements." Now, first let us observe that there is here nothing like a case of an appropriation, as there was in *Attorney-General* v. *Coopers' Company* (1), cited in argument, of the whole body of the estate in the shape of rental, and where the testator enumerated the gifts by means of which that rental was to be exhausted. There is here no case of that kind, and could not be from the nature of things. Here the testator did not know, and not only did not know, but could not by any possibility have known, what was the amount of rent which would fall to the donees to whom he gave the estate, because he gives it after an estate tail in his son has been exhausted. That estate tail might have lasted for a century, or more than a century. Therefore it would be impossible for him to know what the rent would be, or whether it would be more or less at the time this gift took effect. Although we are told that the rental, at the time of the will being made, was £9 16*s.*, or thereabouts, yet it is a question in dispute whether that is proved to be the case. That he must be taken to have contemplated the £8 charged on the estate, leaving £1 16*s.* for repairs, as the total amount of the rental, I think is a contention which one is not at liberty to take into consideration. We must suppose him to have been ignorant of what the surplus would be, or even as to whether there would be any surplus at all.

Then, in that point of view, let us come to a consideration of the case, and I think one will see very clearly what it is that he wishes in effect to do, and what the duty is which he wishes to fasten on the donees of his bounty. I will state what I think is the proper construction of the will taken as a whole. He says: "You must take the estate upon a certain condition; you must pay £8 out of the rents of my property to certain specified objects, and you must keep the estate in repair; and if you do not choose to do those things, then I hand the property over to some one else who will." I think that that is the clear and true explanation of this will. One argument as to the application of the residue of the rents has been this. Those rents so directed to be applied to the repair of charity property are thus devoted to charity purposes. The repair of the charity property is in itself a charitable use. But, observe, in that you are begging the whole question. The question is, whether it is charitable property. It is quite true that if a man says, "I give my estate and the rents of it to be applied in building a college," and then he parcels it out, so much to the master and so much to the scholars, and then the rest to be applied to the repair of the buildings, then the buildings are charity property, and the rest being applied to the buildings the whole amount is clearly devoted to the charity which has been so created. But in order to arrive at that conclusion, namely, that this devotion of the rents to the repair of the buildings is a devotion to charity, you must first hold that the gift is made to a distinct charity, and that the charity is entitled to the houses. Here there is nothing of the kind. There is no interest in the houses whatever given to any of the various persons named, to the poor persons of *Bexley*, or the poor people of *London;* but they have a distinct right to demand of the company £8 per annum, and that seems to me to be the true theory of the whole scheme. They have a charge, fortified in this manner, that if the condition be not fulfilled the property is subject to forfeiture, and if forfeited would pass over to the next taker.

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(1) 3 Beav. 29.

Then it is said—and that is decidedly the stronger way of putting it, and which has given me, I frankly confess, some difficulty, and has induced me to pause in coming to a conclusion in this case—that if the intention was that the surplus should be spent in the reparation of the premises he must have contemplated the company having nothing for their own purposes, because he supposed that the repairs would exhaust the fund. I do not think that is a sound argument to be applied to gifts to corporations, considering the way in which those gifts have been dealt with by the Courts. The different authorities have pretty well settled the law upon the subject, especially those two last cases to which I have referred. I apprehend that the principle is now settled that, in gifts of this description, if you find a gift to a certain body, with certain payments to be made out of the property by them, which payments do not exhaust the subject-matter, the gift remains in that body, and they take the property subject only to their making the payments which are imposed upon them. Now I adopt the construction of the Master of the Rolls, which I think is a reasonable construction, that the rents and profits are to be applied to reparation, so far only as it is necessary for repairs to be done. It is against common sense to suppose that the testator meant that the whole of this property, whatever might be its value, should be expended in reparation, whether it was wanted or not wanted. That would be an absurdity. The testator means nothing more than this: "I charge you with this duty of paying £8 a year. I leave you what may remain for the purpose of repair; you must judge for yourselves whether you will accept the trust under those circumstances. Will you take a property subject to this condition? You have got to pay the £8 a year. If you do not pay the £8 a year, and if you do not keep the premises in repair, some one else will; but you must take it, either for better or worse, upon those conditions." There is a broad distinction between this case and cases where there are fixed sums stated for repairs. You could not by any application of the principles applicable to those cases, extend the objects of the charity, or exceed the amount necessary to be paid in repairs. The Court would not say that something highly ornamental was to be done, nor would it say, there being no college or the like, that additional buildings were to be erected. The testator only cares to have the £8 provided, and the property kept in repair, in order that the £8 may not fail; but he has no intention whatever, with reference to repairs, of saying that they shall be extravagant, or conducted on a large scale, or that additional buildings shall be erected.

6 H.L. 20

I cannot therefore distinguish this case from that class of cases where specific gifts have to be dealt with, and nothing is said about the residue. And, in truth, the case of *Attorney-General* v. *Coopers'*

6 H.L. 20

L. C.
1870
ATTORNEY-GENERAL
v.
WAX
CHANDLERS'
COMPANY.

Company (1) carries still further the view which I am now enunciating, whether or not, regard being had to all the later cases, the result of that case was satisfactory. What happened in that case was this, that the testator did dole out the sums, and mentioned the sum which he had left for repairs. He left an exact sum of £3 to be put into the box of the company towards repairs. But the property having augmented, the Court did not say the company was to take this £3 on the one hand, and to spend and use it for repairs; nor did it say, on the other hand, when it had decided that the property was to be divided, and an aliquot part to go to the company, that they must apply the whole of that to improvements or the whole of it to charity; but it said, on the contrary, the company must keep the property in repair, because it is part of their duty, but subject to that, the surplus, including the £3, goes to them. I am, therefore, of opinion that the true interpretation of this will is, that there is a charge of £8 and a charge for repairs, and there is a conditional limitation over if the corporation fails in paying the £8 and in doing the repairs. If the income from the property is not expended for the purposes to which the testator has willed it, it goes over; as to what is to be done with the residue he has said nothing, and that being so, the property will remain in the condition in which it was held to be in in the case of *Attorney-General* v. *Mayor of Bristol* (2), sanctioned as that has been since by the authorities which I have referred to, and especially by the case of *Mayor of Southmolton* v. *Attorney-General* (3).

I cannot say that the case is free from doubt or difficulty, but on the whole I cannot come to the conclusion that the Master of the Rolls' decision is wrong, and therefore I dismiss this appeal. As the case is not within the recent statute with respect to the costs of the Attorney-General, the appeal will be simply dismissed.

Solicitors: Messrs. *Fearon & Co.;* Mr. *H. Gregory.*

(1) 3 Beav. 29.
(2) 2 Jac. & W. 294.
(3) 5 H. L. C. 1. 10 Jur 435,

KNOX *v.* TURNER.

L. C.
1870
June 15.

12 Ch D 76
764 5-
770
18 Ch D 3
24 Ch D

Annuity—Redemption—Right to Policy.

On the sale of an annuity for the life of the grantor, it was provided that the grantor would appear at an insurance office for the purpose of having his life insured, and would, if he went beyond the seas, pay any extra premiums which might be occasioned thereby; and it was further provided that the grantor might at any time repurchase the annuity for the sum which was originally paid for it.

The purchaser of the annuity insured the life of the grantor, and paid the premiums on the policy of insurance.

The grantor afterwards repurchased the annuity:—

Held, that the grantor of the annuity was not entitled to have the policy of insurance assigned to him.

Decree of *Stuart*, V.C., affirmed.

BY an indenture, dated the 26th of June, 1839, Major *Knox* (who was entitled for his life to the income of large sums of stock), in consideration of £3999 paid to him by *W. Turner*, covenanted to pay to *Turner* an annuity of £318 during the life of Major *Knox*, and assigned the annual proceeds of the sums of stock by way of securing the payment of the annuity. The indenture further contained covenants by Major *Knox* to attend at an insurance office in order to have his life insured by *Turner*, and to pay to *Turner* any sums which he might be obliged to pay as additional premiums in the event of Major *Knox* going beyond the seas or being employed in military service: and the indenture contained a provision enabling Major *Knox* to repurchase the annuity at any time for £3999.

Negotiations had previously been going on for insuring the life of Major *Knox*; and his life was insured by *Turner* for £4000, on which insurance *Turner* continued to pay the premiums.

In 1868 Major *Knox* repurchased the annuity, and then demanded to have the policy of insurance assigned to him. The executors of *Turner* claimed to retain the policy for the benefit of his estate, and Major *Knox* filed the bill in this suit to compel the assignment of the policy.

The Vice-Chancellor *Stuart* considered that the policy was created by money supplied by Major *Knox* as a debtor, and that

L. C.
1870
KNOX
v.
TURNER.

he ought to have the benefit of the policy. But the Vice-Chancellor held himself bound by the decision in *Gottlieb* v. *Cranch* (1), and dismissed the bill, as reported (2), where the facts are fully stated.

The Plaintiff appealed.

Mr. *Greene*, Q.C., and Mr. *Townsend*, for the Appellant:—

The advance of this money, though apparently for the purchase of an annuity, was in fact a loan; and such transactions were very common formerly in order to evade the usury laws, but were never anything but securities for the money; when the annuity was repurchased the whole thing came to an end, and the debtor had a right to all the securities: *Morland* v. *Isaac* (3); *Lea* v. *Hinton* (4); *Drysdale* v. *Piggott* (5); *Courtenay* v. *Wright* (6). The borrower in all these cases grants an annuity which is just sufficient to cover the interest and premium, the intention of the parties being that an insurance shall be effected. The deed expressly points to an insurance, and all the circumstances shew what was the real nature of the arrangement.

[The LORD CHANCELLOR:—If Mr. *Turner* had not insured, would Major *Knox* now have any remedy against Mr. *Turner's* executors?]

Each of these cases rests upon its own circumstances. If Major *Knox* had gone abroad, and had been compelled to pay further premiums, would he not have had the benefit? Those premiums would certainly have been paid with his money, and we contend that the other premiums were also paid with his money. If it had been a simple sale of an annuity the case would have been different, but here the repurchase and the insurance were all contemplated, and the whole transaction was only a loan and a security for the repayment.

Mr. *Dickinson*, Q.C., and Mr. *Bedwell*, for the Defendants, were not called upon.

(1) 4 D. M. & G. 440. 17 Jur 704
(2) Law Rep. 9 Eq. 155.
(3) 20 Beav. 389. 1 Jur NS 989
(4) 5 D. M. & G. 823.
(5) 8 D. M. & G. 546. 2 Jur N S
(6) 2 Giff. 337. 6 Jur NS 12

LORD HATHERLEY, L.C.:—

The Plaintiff in this case has confused the purchase of a redeemable annuity with an advance as a loan—two things quite different, not in form merely, but in substance; for in the latter case the person who receives the money remains a debtor, in the former case he does not.

Major *Knox* was obviously in want of money, and might have raised it either by borrowing or by the sale of a life-annuity, the latter plan being probably adopted in order to evade the usury laws; but, whatever was the motive, he knew what he was doing. At present he would probably mortgage his life-interest and insure his life, covenanting to pay the interest and the premiums; but then he would be a debtor, and whenever the lender wanted to be paid he might proceed to sue the borrower, or might sell under a power of sale, and the relation of debtor and creditor would exist between them. If the other plan was adopted, the person in want of money might sell a life-annuity for a given sum, and might reserve the option of repurchasing the annuity on given terms; but until the repurchase, the annuity would remain, and the holder of the annuity would have no one against whom to proceed, but must depend upon his annuity for repayment. No doubt in making the bargain he takes an annuity large enough to cover the contingency of the death of the grantor, which is, in fact, an annuity large enough to pay the interest, and to insure the life of the grantor for the principal.

It was argued that this policy of insurance was in fact bought with Major *Knox's* money, but that was not so, as the annuity was *Turner's* until it was repurchased, and he could either save it, or spend it in premiums or in any other way. As a prudent man he laid out part of it in insuring the life of Major *Knox*. But suppose that he had not done so, and had either kept the money in a box or laid it out at interest, could it then be pretended that Major *Knox* would have any claim on the money so accumulated? And does it make any difference that the money was invested in another way?

I am altogether unable to understand the view which is taken by Major *Knox* in making this claim. Where is the contract between Major *Knox* and Mr. *Turner?* The only thing alleged is

L. C.
1870
Knox
v.
Turner.

that the deed contains a provision that if Major *Knox* goes abroad, or enters the military service again—in either of which cases the purchaser of the annuity would find a difficulty in securing his capital—then Major *Knox* would repay the additional premiums required. No doubt the purchaser of the annuity intended it to be large enough to pay him 5 per cent. interest and the premiums necessary to secure the capital, and he would be put out of his calculations if Major *Knox* went abroad; he therefore stipulated for a further payment if he was put to extra expense.

With all due submission to the learned Vice-Chancellor, I think that there is a fundamental error in treating this as a case of debtor and creditor, and in speaking of this insurance money as property created by Major *Knox's* money. I am unable to see that there was any relation of debtor and creditor between Major *Knox* and Mr. *Turner*, and it appears to me that the annuity belonged not to Major *Knox*, but to the purchaser, until Major *Knox* chose to buy it back. The appeal must be dismissed with costs.

Solicitors: Mr. *H. Smith*; Mr. *M. Turner*.

L. C.
1870
June 3.

6 Ch 275,
Ch 239, 240

Ex parte MANCEAUX.

Patent—Similar Invention—Practice—Reference to Law Officer—Costs.

When the sealing of a patent is opposed on the ground that the invention is similar to one which is the subject of an existing patent, a reference will be made to the Law Officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for; the opponent paying the costs of the hearing, unless there has been fraud on the part of the applicant.

Second patent refused 6 Ch 272

THIS was a Petition praying to have the Great Seal affixed to letters patent which had been applied for by one *Manceaux*, on the 9th of July, 1869. It was opposed by one *Le Baron*, who, on the 1st of March, 1869, had applied for, and on the 27th of August, 1869, had obtained, letters patent for what he alleged to be a similar invention.

Mr. *Kay*, Q.C., Mr. *Haddan*, and Mr. *T. Aston*, in support of the application, contended that *Manceaux's* patent was for an

L. C.
1870
Ex parte MANCEAUX.

improvement which was not included in *Le Baron's* patent. If there was anything in the objection, *Le Baron* ought to have appeared before the Law Officer to oppose the issue of his warrant, and was now too late. They cited *In re Brennard's Patent* (1), *Ex parte Bates and Redgate* (2), *In re Mitchell's Patent* (3), and *Ex parte Yates* (4), as to the right to oppose the affixing of the seal.

Mr. *Freeling* and Mr. *Macrory*, for *Le Baron*.

LORD HATHERLEY, L.C., said that he should make an order following that in *Ex parte Yates*, and refer the matter to the Law Officer. On similar applications, however, in future, the opponent would be obliged to pay the costs of the hearing, unless there had been fraud on the part of the Petitioner. The reference at this stage of the proceedings was a matter of indulgence to the opponent.

Solicitors: Messrs. *Johnson & Weatheralls*; Mr. *Appleyard*.

DINHAM *v.* BRADFORD.

L. C.
1869
June 30;
July 28.

8 Ch 2,
20 [illegible]

Arbitration—Enforcing Agreement—Profits of Partnership.

Where two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement:—

Held, that though the valuation could not be so made, because no umpire was provided, the Court would carry the partnership agreement into effect by ascertaining the value of the share.

Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value.

Where profits are left by a partner in a business he will not, in the absence of a special agreement, be allowed interest on them.

In ascertaining the profits of a business, the value of the partnership

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(1) 3 D. F. & J. 695. 7 Jur NS 690

(2) Law Rep. 4 Ch. 577.

(3) Law Rep. 2 Ch. 343.

(4) Ibid. 5 Ch. 1.

L. C.
1869
DINHAM
v.
BRADFORD.

property is to be found, and the original capital with interest thereon (if necessary) is to be deducted; the residue will represent the profits.

Decree of *Stuart*, V.C., affirmed.

T. BRADFORD, the Defendant in this case, was a manufacturer of washing-machines at *Manchester*, and was owner of several patents relating to such machines. In December, 1865, the Defendant and the Plaintiff, *W. H. Dinham*, entered into partnership under articles, dated the 30th of December, 1865, by which it was provided that they would be partners for three years; that the capital should consist of £6000, being the valuation of the patents, stock-in-trade, and credits of *Bradford*, and £1000 to be brought in by *Dinham*, on which amounts they should respectively be allowed interest at £5 per cent.; and if either party should, with the consent of the other, advance money for the use of the partnership, interest as aforesaid should be allowed thereon; the profits were to be divided in thirds, *Bradford* taking two thirds and *Dinham* one third; either partner might put an end to the partnership by six months' notice; and by the 16th article it was provided that in case *Dinham* should die before the expiration of the said term, or during the continuance of the partnership, *Bradford* should, within six months after the decease of *Dinham*, settle and adjust with his representatives all accounts, matters, and things relating to the partnership; and the value of the share of *Dinham* of and in the property and effects of the partnership should be ascertained by two indifferent persons, one to be chosen by *Bradford* and the other by the representatives of *Dinham;* and *Bradford* should thereupon become the purchaser of the share at such valuation, and should enter into a bond in a sufficient penalty, securing to the representatives of *Dinham* the amount of such valuation by two equal instalments at the respective periods of three and six months next after the decease of *Dinham*, with interest at the rate of £5 per cent. per annum from the time of such decease, and also a bond for indemnifying the estate and effects of *Dinham* against the debts and demands due or owing by or from the partnership; and by the 17th article it was provided that, "In the event of the determination of the said partnership by effluxion of time, or by either of the partners by notice as aforesaid, the said *T. Bradford*, or his representatives, as the case may be, shall purchase the share of the said *W. H. Dinham* upon the same terms in all respects as is hereby provided in case of the death of the said *W. H. Dinham* during the continuance of such partnership."

Business was carried on under these articles, and by agreements for its continuance, until the 31st of March, 1869, when it expired by effluxion of time. The solicitors of *Dinham* proposed to have two arbitrators and an umpire appointed to value the stock, &c., but disputes arose as to *Bradford's* share in the capital, and the proposal was abandoned. *Dinham*, on the 5th of May, 1869, filed the bill in this suit, alleging that under these circumstances the 17th article ceased to have any effect, and it became his right to have the partnership wound up in the ordinary way, and praying a declaration that the partnership had determined by effluxion of time on the 31st of March, 1869, but that the Plaintiff was entitled to one-third of the profits since that time; and praying, further, that the accounts might be taken, and that what was due might be paid to the Plaintiff; that a receiver might be appointed, and the assets of the business sold.

The suit was heard upon motion for decree before Vice-Chancellor *Stuart*, who, on the 22nd of May, 1869, made declarations that the partnership determined on the 31st of March, 1869, that the Defendant was a purchaser of the share of the Plaintiff at a price which was to be ascertained, and that the Plaintiff was entitled to interest at £5 per cent. from the dissolution of the partnership on the amount of the value of such share; and directed accounts from the 30th of December, 1865, and the value of the share and interest of the Plaintiff in the capital and profits on the 31st of March, 1869, to be ascertained, and ordered the Defendant to pay what should be found due, and that each party should bear his own costs to the hearing.

The Plaintiff appealed.

Mr. *Greene*, Q.C., and Mr. *L. Bird*, for the Appellant:—

We complain of several things: first, there should have been an account of the profits left in the concern, and interest calculated thereon. Then, we contend that *Bradford* is not a purchaser, but a partner, and that the accounts must be taken on that footing. No doubt the 17th article was intended to provide for a purchase, but there is no provision for the appointment of an umpire, and if the arbitrators do not agree the arbitration must fail; there is, therefore, an agreement for arbitration which the Court cannot enforce: *Featherstonhaugh* v. *Fenwick* (1), *Cook* v. *Collingridge* (2), *Kershaw* v. *Matthews* (3); and the partnership property must be sold as if there had been no agreement as to the dissolution.

Mr. *Dickinson*, Q.C., and Mr. *A. Dixon*, for the Defendant, were not called upon.

July 28. LORD HATHERLEY, L.C., after stating the facts of the case, continued:—

There was one clear and manifest object of this agreement. If *Dinham* died, or the partnership ceased by expiration of time or by notice, then *Bradford*, or his executors in the event of his dying during the partnership, should always have the option of purchasing the share of *Dinham*, and the property was not to be broken up or sold, but the value of the share of *Dinham* was to be ascertained. The mode of ascertaining it was not very felicitous, because an arbitrator was to be appointed on each side, but no provision was made for the appointment of an umpire, and the consequence is that difficulties have arisen. *Bradford* denies that the difficulties would be insuperable, but they would probably be practically insuperable if any steps were taken to ascertain the value of the partnership assets in the manner prescribed; and *Dinham* says that the consequence has been that the property cannot be valued at all, relying, as he does, on the authorities, which determine that an agreement for sale by arbitration *simpliciter* by arbitrators to be named by the parties is not such an agreement as can be carried into effect by this Court, because the Court cannot substitute itself for the persons to be chosen so as to ascertain the amount to be paid.

It appears to me, I confess, that this case is entirely out of that range of authorities. The whole scope and purport of this agreement was, that the partnership was to go on for a certain definite

(1) 17 Ves, 298, 309.

(2) Jac. 607, 620.

(3) 2 Russ. 62.

time. The whole plant and property of the partnership, and everything else, was to be brought in by *Bradford*, and he was to admit *Dinham* into partnership for a limited period, *Dinham* contributing £1000; and then, at the end of the partnership, *Bradford* was to pay *Dinham* his share, whether *Dinham* died or *Bradford* died, or the partnership was terminated in any other manner.

This case is not like that of the sale of an estate the price of which is to be settled by arbitration, but is a case in which the whole scope and object of the deed would be entirely frustrated if the Court were to apply the well-known doctrine to the present state of circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was, and the money where it was. But here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed, on account of the difficulty which has arisen. It is much more like the case of an estate sold, and the timber, on a part, to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement; and in such cases the Court has found no difficulty. If the valuation cannot be made *modo et formâ*, the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?

So far as that part of the case is concerned, it seems to me that the decree is perfectly right.

[His Lordship then expressed his opinion that, in taking the accounts, *Bradford* would be credited with his original £6000, and *Dinham* with whatever he had brought in, and interest on these sums would be calculated, and all that remained would be profit, on the principles laid down in *Watney* v. *Wells* (1).]

(1) Law Rep. 2 Ch. 250.

L. C.
1869
DINHAM
v.
BRADFORD.

A further question was raised by *Dinham*, whether he was not entitled to treat as capital the profits left in the concern. Of course if they were left in as capital by agreement that would be plain enough, but if they were left in simply because they were not divided, I cannot treat them as capital advanced. Neither party has a right to consider them as advanced for capital. Either party could have drawn out his share at any time he pleased; but the simple fact that the money was lying there, which neither party was inclined or wanted to draw out, will not warrant me in taking the account in that fashion.

I do not, in fact, vary the Vice-Chancellor's decree at all, but I think that a direction should be added that the account ought to be taken upon the footing of the articles of agreement, and that, in ascertaining the value of the shares, the Defendant is to be credited with the sum of £6000 as the capital brought in by him, and with such further capital, if any, as he may have subsequently brought in during the partnership, and the Plaintiff with such sums of money, if any, as he may have brought into the partnership during its continuance; but neither party is to be credited with the amount of undivided profits as additional capital, unless it shall have been so treated in the partnership books. The costs of the appeal must be paid by the Appellant, as the alterations have been made merely to render the decree rather more clear.

Solicitors for the Plaintiff: Messrs. *Clarke, Woodcock, & Ryland.*
Solicitor for the Defendant: Mr. *Dixon.*

HOOD *v.* NORTH EASTERN RAILWAY COMPANY.

L. C.
and L. J. G.
1870
Feb. 23;
March 2.

11 Eq 120
7 Ch 414
9 Ch 284

Specific Performance—Railway Company—Jurisdiction—"First-class Station."

On the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should for ever thereafter be used as a first-class station. The station was built, and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1869 the landowner filed a bill to compel the company to build a larger station, and to stop all the trains at that station:—

Held, that as the existing station had not been objected to, and had remained for many years, and as it did not appear that the passengers were numerous, the Court would not compel a larger station to be built; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express, and special trains, must stop at this station.

Decree of *James*, V.C., partly affirmed and partly reversed.

THE Plaintiff in this case was the owner of the *Pepper Hall* estate in the county of *York*, which he had purchased in 1863, and the Defendants were the *North Eastern Railway Company*, whose railway ran through the *Pepper Hall* estate. That part of the railway was constructed by the *Great North of England Railway Company*, whose railway ran from *York* to *Newcastle*, and was afterwards extended to *Darlington*, and which, with other companies, afterwards formed the *North Eastern Railway Company*. By a deed dated the 26th of March, 1838, and made between the trustees for Lord *Alvanley*, who were the then owners of the *Pepper Hall* estate, and the *Great North of England Railway Company*, it was agreed that certain pieces of land, part of the estate, should be sold to the company; that one of these pieces of land should be used as a depôt for goods, and should be for ever thereafter used and employed as, and for, a "first-class station" or place for the purposes of taking up and setting down passengers travelling along the said railway. A station was accordingly built, and called the *Cowton Station*, and the line was opened in 1842. The Plaintiff now alleged that the accommodation was not sufficient, and not such as should be given at a first-class station, and that only nine out of twenty-three trains in the day stopped there; that, in fact,

L. C.
and L. J. G.
1870
Hood
v.
North
Eastern
Railway Co.

Cowton Station was used and designated by the company as a third-class station. And the Plaintiff filed a bill, praying that the company might be restrained from using the piece of ground conveyed to them in any other manner than as a first-class station for taking up and setting down passengers, and as a depôt for goods carried along the railway.

The Plaintiff contended that all the trains ought to stop at *Cowton*, and that the station ought to be made much larger.

The Defendants entered into evidence to shew that the station was large enough for the traffic, and that it was impossible to divide stations into first, second, and third classes; that the other stations where more trains stopped were junctions, and of more importance to the public; that some of the trains which did not stop at *Cowton* were mail-trains, which by Act of Parliament could only be stopped at stations determined upon by the Postmaster-General; and others were Scotch express trains, which stopped nowhere between *York* and *Darlington*. The number of trains which stopped, and the places where they did stop, were not, however, clear upon the evidence.

The suit came on to be heard before the Vice-Chancellor *James*, who directed an inquiry as to what rooms and conveniences ought to be supplied for the reasonable accommodation of the station at *Cowton* as a first-class station; and ordered the company to supply such rooms and conveniences, and restrained the company from allowing any of its ordinary or fast trains other than mail, express, or special trains to pass the station without stopping.

The case is reported (1), where the facts and the evidence are more fully set out.

The Defendants appealed.

Mr. *Kay*, Q.C., and Mr. *Williamson*, for the Appellants:—

When this agreement was made this was a comparatively small railway, and we have no objection to allow all trains which would have stopped upon that railway to stop at *Cowton;* but the railway has now become part of the line from *London* to *Scotland*, which never could have been contemplated in 1838, and a Court of Equity ought not to order trains to stop there which would not have run

(1) Law Rep. 8 Eq. 666.

upon the original line. The covenant is not clearly worded, and must be construed according to the state of things when it was entered into. The mail-trains are not in the power of the company. Even now more trains stop at *Cowton* than could have been originally contemplated. The only places between *York* and *Newcastle* where more trains stop are junctions. No definition of a first-class station can be given, and we already give as much accommodation to *Cowton* as is required there. As to the buildings, they are quite sufficient; at all events, they were allowed to be sufficient when they were built, and it is now too late to complain.

Mr. *Amphlett,* Q.C., and Mr. *Jones Bateman,* for the Plaintiff, cited *Sanderson* v. *Cockermouth and Workington Railway Company* (1); *Lytton* v. *Great Northern Railway Company* (2); *Lloyd* v. *London, Chatham, and Dover Railway Company* (3); *Rigby* v. *Great Western Railway Company* (4).

Mr. *Kay,* in reply.

Lord Hatherley, L.C., after stating the facts of the case, and that the agreement was very confused and difficult to interpret, continued :—

One thing, however, in the agreement appears sufficiently clear for the Court to act upon, which is, that there was to be at *Cowton* a station or place for the purpose of taking up and setting down passengers, and not only a station, but a first-class station. Upon these words two controversies have arisen, one with regard to the bad accommodation which is said to be afforded for goods and passengers; and the other, which has been chiefly contended for on the part of the Plaintiff, with regard to the number of trains that stop to take up or set down passengers at that place.

The Vice-Chancellor has, by the first part of his decree, directed an inquiry what would be sufficient accommodation for passengers treating this as a first-class station; and he has directed, as the result of that inquiry, that the Defendants should supply the necessary accommodation. But it appears to both of us impossible to sustain that part of the decree, regard being had to all that has

(1) 11 Beav. 497.
(2) 2 K. & J. 394. 2 Jur NS 437
(3) 2 D. J. & S. 568. 11 Jur NS 380
(4) 2 Ph. 44.

L. C.
and L. J. G.
1870
Hood
v.
North
Eastern
Railway Co.

passed. Whatever be the correct interpretation of the covenant as to the buildings to be erected, they have now stood ever since the opening of the railway in 1842; and it does not appear that any complaint whatever was made with reference to the accommodation in that sense. We must, therefore, suppose that the persons who saw the station erected and built in the first instance, were satisfied with that which was erected, and this Court cannot now decree specific performance of that which, at all events, appears to have been waived for so long a period.

Moreover, if we look at the words of these covenants, I think the true and sensible construction of them is, that this was to be a first-class station for taking up and setting down passengers; and that that was the primary object of this contract. This is a small place, and cannot possibly have any great traffic; and the intention of the parties was, that the company should afford the travellers at that station, few as they might be in number, all the advantages that were given to any other station on the line. First-class must mean something, and must mean that the station shall be in a position at least equal to any other station.

But, then, in what respect is the position to be equal? I think it must be held to mean in respect of taking up and setting down passengers, because to hold that this is to be a first-class building or erection would be absurd. What would be a sufficient building in a place where there are few passengers, would not be so where there are many passengers. There must be different accommodation where there are few passengers and where there are many passengers. A place, therefore, where there never can be any great number of passengers, never can be a first-class station as to buildings, in the view either of the Plaintiff or of the Defendants.

As regards Lord *Alvanley* and his trustees, who were the predecessors of the Plaintiff, their object was to travel and to be able to proceed as quickly as possible; and, as regards the Defendants, it would be a very unjust and inconvenient interpretation to hold that they meant to have the same buildings at *Cowton*, where four or five passengers might be expected, as on other parts of the line where 400 or 500 passengers might be expected.

The real agreement was, that the Plaintiff should have as many advantages for stopping as there were at any other place upon the line. The line was originally to be from *Newcastle* to *York*, but was afterwards extended from *York* to *Darlington*. The two termini, of course, will be out of the question, because every train must stop at the terminus; but the covenant means that the Plaintiff is to have as many opportunities of travelling as are given to any other persons between the two termini.

On that part of the case we think the Vice-Chancellor has only done what we are disposed ourselves to do in making certain exceptions. This being, now, part of a large system of railways, there are certain trains for the general convenience of the public travelling along the whole line from end to end, stopping nowhere if they can help it, or at all events only at some of the very large towns on the road. Such trains have really nothing to do with these places between *York* and *Darlington*, and, with regard to them, it does not appear to us that they were contemplated by the contract.

Then, as regards special trains. Of course they are hired for a special purpose, and may be hired by anybody to stop at *Cowton* or at a third-class station if wanted.

Then, with regard to the mail-trains, the Government has entered into certain arrangements with regard to them which cannot be interfered with, and we therefore consider that everything excepted by the Vice-Chancellor was well excepted, and will be excepted now.

The order will, therefore, be varied by leaving out all the directions as to the accommodation in the way of buildings or otherwise, but restraining the Defendants from stopping a less number of trains in the twenty-four hours for the purpose of setting down and taking up passengers or otherwise, than may from time to time stop at the most favoured stations between *York* and *Darlington*, excepting, however, express, special, or mail trains. Further, it will not be necessary now to give the company liberty to apply as to making other arrangements, and the more correct way will be to give the Plaintiff his rights with reference to the stopping of these trains, and leave him out of Court to make any arrangements that may be thought convenient consistently with those rights. As the Plaintiff has not absolutely succeeded, there should be no costs of the appeal.

L. C. and L. J. G.
1870
Hood v. North Eastern Railway Co.

Sir G. M. Giffard, L.J.:—

I concur in the opinion which the Lord Chancellor has expressed. The question arises upon an agreement with a railway company which was to form a railway from *Newcastle* to *York* and afterwards from *York* to *Darlington*. The agreement is certainly very obscurely worded, but I think that the part on which we have to act is sufficiently plain. Whether this agreement did or did not extend to buildings, we must take it that when once the buildings were completed and erected without objection, there was an end to that question, and that nothing more can be done on the subject, especially at this distance of time.

Then we come to the use of the land, which is to be used and employed as and for a first-class railway station for the purposes of taking up and setting down passengers. Now, in the first place, that cannot mean first-class with reference to *Cowton*, which would have no meaning whatever, and there is nothing really to compare with it. It must mean first-class with reference to something which it can be compared with. The fairest way of comparing it is undoubtedly to exclude the termini, and to compare it with the other intermediate stations between *York* and *Darlington*. That being so, it is quite clear that *Cowton Station* has not had such good accommodation with reference to taking up and setting down passengers as other stations between *York* and *Darlington* have had, and that by this there has been a breach of the covenant. The proper form of order will be that which has been already dictated, namely, an order to put this station with reference to the taking up and setting down of passengers on the same footing as the most favoured stations between *York* and *Darlington*. That is exactly what the order of the Vice-Chancellor does. It follows, from what I have stated, that any inquiry as to station room, or anything with reference to the building for the purpose of goods, is entirely out of the question.

Solicitors: Mr. *J. J. Darley*, agent for Messrs. *Newstead & Wilson, Leeds;* Messrs. *Williamson, Hill, & Co.*, agents for Messrs. *Richardson, Gutch, & Co., York.*

WALTERS *v.* WEBB.

L. C.
and L. J. G.

1870

March 23.

Copyholds—Seizure quousque—Statute of Limitations.

Where the lord had seized copyholds *quousque*, and had held them for nearly forty years:—

Held, that a bill by the heir of the former tenant to compel admittance by the lord was a suit to recover land within the meaning of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), ss. 2, 3, and that the right of the heir was barred by that statute.

Decision of *Malins*, V.C., affirmed.

THE Plaintiff in this case was the heir of a copyholder whose lands had been seized *quousque* before the year 1831, and the bill asked that the Defendants, the lords of the manor, might be decreed to admit the Plaintiff, he having offered in 1868 to pay the fines and fees, and having demanded to be admitted.

The Defendants demurred, and Vice-Chancellor *Malins* allowed the demurrer, considering the *Statute of Limitations* (3 & 4 Will. 4, c. 27), to be a bar to the Plaintiff's demand, as reported (1).

The Plaintiff appealed.

Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Bradford*, for the Appellant:—

The lord by seizing *quousque* obtains no estate, but is merely entitled to receive the rents and profits until the tenant claims: *Watkins* on Copyholds (2); *Doe* v. *Trueman* (3); *Doe* v. *Harrison* (4); *Doe* v. *Muscott* (5); *Andrews* v. *Hulse* (6). If the lord had seized for forfeiture, it would be different, but he has only seized *quousque*: *Dimes* v. *Grand Junction Canal* (7). The Defendants rely on 3 & 4 Will. 4, c. 27, ss. 2, 3, but this is not a suit to recover land or rent, but merely to compel the lord to do his duty and admit the Plaintiff: *Dean of Ely* v. *Bliss* (8); and the Court acts on the conscience of the lord unless there is some statute to justify him. The lord might have granted this land *quousque*, and then this

(1) Law Rep. 9 Eq. 83.
(2) Page 66.
(3) 1 B. & Ad. 736.
(4) 6 Q. B. 631.
(5) 12 M. & W. 832.
(6) 4 K. & J. 392. 4 Jur N S 522
(7) 9 Q. B. 469.
(8) 2 D. M. & G. 459.

L. C. and L. J. G.
1870
WALTERS v. WEBB.

would clearly be no proceeding to recover land, and there is no difference in principle between the cases. If the lord had seized wrongly, of course the statute would have run, but he has been rightly in possession, always subject to the claim of the tenant: *Pickett* v. *Packham* (1).

Mr. *Wickens*, and Mr. *Cracknall*, for the Defendants, were not called upon.

LORD HATHERLEY, L.C.:—

The bill in this case states that the grandfather of the Plaintiff was in possession of these copyholds, and that they were seized by the lord *quousque*, but does not state the exact time of the seizure; we must, however, assume, there being no statement to the contrary, that the land remained in the possession of the lord after having been seized by him in the lifetime of the grandfather, who died in 1831. The question, then, is, whether this bill can be maintained, having regard to the 2nd and 3rd sections of the *Statute of Limitations* (3 & 4 Will. 4, c. 27). Now the Plaintiff's claim is clearly barred by those sections unless he is right in saying that this is not a proceeding to recover land, or else in saying that his right to possession did not accrue until tender had been made of the dues in respect of the non-payment of which and of the service in respect of the non-render of which the lord had seized, and that, therefore, he is to have the period of his right of action measured, not from the time when the grandfather first committed the default in respect of which the seizure was made, but from the time when the Plaintiff made his tender, which was a short time before the filing of the bill.

Now, as regards the last point, I apprehend it is impossible to hold that if the heirs or other persons having a right to admittance neglect for 200 or 300 years to do that duty which they were bound to perform within a given time, then at the end of that 200 or 300 years (for of course if the case is good for 30 or 40 years, it is good for 200 or 300 years), the service might be tendered and the fine offered, and thereupon the right to be admitted would accrue only from that moment. In the case of a Welsh mortgage, or in the case of elegit, the compact is, that the debt is to be satisfied out of the rents and profits. In *Yates* v. *Hambly* (1) Lord *Hardwicke* says, that even in that state of things, although the entry was originally lawful, the right to proceed by ejectment would accrue the moment the debt had actually been satisfied according to the contract, and the twenty years would have to be reckoned from that period. But in that case there is no duty imposed on the man against whom the judgment is recovered, or who has given a mortgage of that description, to make a tender. He may make the tender if he thinks fit, but he has made a contract by which the debt is to be satisfied in a different mode. Here, however, it is actually the duty of the copyhold tenant to pay his fine, and to perform the services; and if it is for neglect of duty that the seizure is made, he cannot possibly claim the benefit of his own delay and laches, and of his own default in performing that duty, so as to obtain additional time before he is barred by the *Statute of Limitations*. That would be an unreasonable construction of the Act, and not one which the Court would willingly adopt.

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(1) Law Rep. 4 Ch. 190.

The only other question is, whether this is an action for the recovery of land? I think it was put by the Lord Justice during the course of the argument in a way which is unanswerable, that this bill is in effect simply to compel the lord to admit a right of entry in the person who files the bill. The admittance is no doubt necessary if he should choose to proceed in ejectment against third persons, but as regards the lord, whom we must suppose now to be in possession, the bill is an attempt to compel the person in possession of the land to acknowledge that the claimant has a right of entry by admitting him and placing him on the Court rolls. It seems to be trifling to say that this is not a proceeding for the recovery of land. It may not be a step through which the land may be instantly recovered, but it is one step which will immediately and instantly give to this claimant that which he has been deprived of by the statute, namely, the right of entry on the land. That being so, I think the Vice-Chancellor has come to a right conclusion in holding that the statute is a bar to a suit of this kind, and that the lord is not compelled to admit this claimant for

(1) 2 Atk. 360.

L. C.
and L. J. G.
1870
WALTERS
v.
WEBB.

the purpose of giving him that right to recover the land which at this moment he does not possess.

SIR G. M. GIFFARD, L.J.:—

I am of the same opinion: I think that, in the first place, this suit is a suit for the recovery of land within the meaning of the statute; and secondly, that there has been a discontinuance by the Plaintiff within the meaning of the statute.

It is plainly a suit for the recovery of land, for the Plaintiff is calling on the lord to admit his right of entry as being entitled to certain land. Then with respect to its being a discontinuance, there is no analogy whatever between the position of a copyhold tenant and a tenant by elegit, or a mortgagee in possession under a Welsh mortgage, or a person who has a right to hold until he has been paid certain sums out of rents. The real truth is, that a seizure *quousque* is simply notice to the tenant that he is bound to come forward and pay, for his right of entry accrued when his ancestor died. That being so, the bill is clearly unsustainable, and the demurrer must, therefore, be allowed with costs.

Solicitors for the Plaintiff: Messrs. *Rooks, Kenrick, & Harston.*
Solicitor for the Defendants: Mr. *H. White.*

L. C.
and L. J. G.
1870
March 23.

CASTLE *v.* WILKINSON.

Vendor and Purchaser—Husband and Wife—Abatement in Price.

Where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey:—

Held, that the purchaser could not compel the husband to convey his interest and accept an abated price.

R 18 Eq 683, 4, 6
ch D 267.
ch D 461-8
ch D 178
App Cas
422-8

ANN RICHARDSON, the wife of the Defendant, *Benjamin Richardson*, was equitably entitled as tenant in fee simple to an undivided moiety of certain lands in *Yorkshire*; and by an agreement dated the 5th of October, 1863, and made between *Benjamin Richardson* and his wife of the one part, and the Plaintiff, *R. Castle*, of the other part, *Richardson* and his wife agreed to sell, and

R. Castle to purchase, "All that the moiety or equal half part of the said *B. Richardson*, and *Ann* his wife, in right of the said *Ann Richardson*," of and in the lands above-mentioned, "and the freehold and inheritance thereof in fee simple, freed from all charges and incumbrances," for £600; and by the agreement provisions were made for the execution of the deed of conveyance and for the acknowledgment by *Ann Richardson*. *Richardson* and his wife alleged that they were not bound by this agreement, and refused to convey.

On the 7th of September, 1864, *Richardson* and his wife executed a deed of conveyance of the same moiety of the lands to the Defendant *Wilkinson*, in consideration of £550, and the deed was duly acknowledged by *Ann Richardson*.

A suit of *Wilkinson* v. *Castle* for a partition was afterwards instituted by *Wilkinson*, and after several proceedings in that suit the bill in this suit was filed by *Castle* against *Wilkinson* and *Richardson*, charging that the agreement of the 5th of October, 1863, was binding on *Richardson* so far as related to his estate and interest in the moiety comprised therein, and ought to be specifically performed with such abatement of the purchase-money as the Court should deem just; that the conveyance of 1864 was a fraud upon the Plaintiff, and that the Defendant *Wilkinson* was bound to give effect to the agreement of 1863. And the bill prayed for relief accordingly.

The suit now came on as an original motion for decree, together with the suit of *Wilkinson* v. *Castle* on a rehearing.

Mr. *Karslake*, Q.C., and Mr. *Morgan*, Q.C., for the Plaintiff *Castle*:—

The attempt to shew that this agreement was not binding has failed, and this is a clear breach of faith by *Richardson* and his wife. The Court cannot touch the wife's estate, but the Plaintiff ought to have all that *Richardson* can give him on paying a proper price; the abatement can easily be calculated: *Barnes* v. *Wood* (1); *Nelthorpe* v. *Holgate* (2); *Emery* v. *Wase* (3); *Sugden's* Vendors and Purchasers (4).

(1) Law Rep. 8 Eq. 424.
(2) 1 Coll. 203.
(3) 5 Ves. 846.
(4) 14th Ed. p. 206.

L. C. and L. J. G.
1870
Castle v. Wilkinson.

Mr. *Greene*, Q.C., and Mr. *C. Russell*, for the Defendant *Wilkinson*.

Mr. *H. A. Giffard*, for other parties.

9 Ch D 178

Lord Hatherley, L.C., after stating the facts of the case, continued:—

18 Eq 686

The only question however is, whether this bill for specific performance can be maintained to the extent of holding that *Richardson* shall part with all the interest he can part with, namely, his estate for the joint lives of himself and his wife, and his estate by curtesy, with an abatement of the purchase-money. Now, I apprehend that the law is settled as to this upon the authorities referred to by Lord *St. Leonards* (1), that if a man professes to be owner of the fee simple, and undertakes to sell the fee simple, and it turns out that he had not power so to do, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can, and submit to an abatement. But the case is wholly different where the vendor does not profess to sell the fee, but only that estate which he is able to dispose of. Here, on the face of the agreement, the husband and wife intended to sell, and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole.

The latest authority, *Barnes* v. *Wood* (2), before Vice-Chancellor *James*, is in strict conformity with the other authorities, as indeed one might well expect it to be, namely, that where a man proposes to convey the whole of an estate, as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the Court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling.

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(1) Sug. V. & P. 14th Ed. ch. 8, § 1.

(2) Law Rep. 8 Eq. 424.

L. C.
and L. J. G.
1870
Castle
v.
Wilkinson.

Since the case of *Emery* v. *Wase* (1), the whole matter has been settled, and as the purchaser has chosen to file this bill with a full knowledge of the law and facts, his bill must be dismissed with costs as against *Wilkinson,* and without costs as against *Richardson.*

Sir G. M. Giffard, L.J.:—

In this case the attempt made by this bill is to enforce specific performance of a contract between a husband and wife and the purchaser; the purchaser not being misled in the slightest degree by anything appearing upon the face of the contract, because the contract states plainly and clearly upon the face of it, not that *Richardson* is entitled to the fee simple, but that he is entitled to the land in right of his wife, and that the fee simple is in truth in his wife.

That being so, it is the unquestionable law of this Court that such a contract cannot be enforced either partially or wholly. All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple. Here it is quite clear that the purchaser never could have believed for one moment that he could purchase the fee simple; and that being so, the bill must be dismissed. For myself I should have thought the law too clear for argument.

Solicitor for the Plaintiff: Mr. *Rushworth.*

Solicitors for the Defendant *Wilkinson:* Messrs. *Edwards, Layton, & Jaques.*

(1) 5 Ves. 846.

L. C.
and L. J. G.
1870
June 7.

12 Eq 162,
Ch 25.
Eq 115, 120
193-4,
Ch D 641.
Ch D 809
Ch D 9
Ch D 321
Ch D 391
393,
Ch D 78

FREEMAN *v.* POPE.

Voluntary Settlement—Stat. 13 *Eliz. c.* 5.

When a settlement is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect; but, *semble*, the mere fact that it has, in the event, prevented a creditor, who was such when it was made, from obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.

Spirett v. *Willows* (1) considered.

Decree of *James*, V.C., affirmed.

THIS was an appeal by the Defendant *Pope* from a decree of Vice-Chancellor *James*, setting aside a voluntary settlement, dated the 3rd of March, 1863, by which the Rev. *J. Custance* assigned to trustees for the benefit of *Julia Pope* (then *Julia Thrift*) a policy of insurance for £1000 (effected by him in 1845 on his own life), and covenanted to pay the premiums. It appeared that he had previously settled this policy upon her in 1853, reserving a power of revocation, which he exercised in 1861, in order that he might receive a bonus.

At the time when the settlement now impeached was made, the settlor held two livings producing a net income of £815, and he was entitled to a Government life-annuity of a little more than £180, and to a copyhold cottage which he on the same day covenanted to surrender to Mrs. *Walpole*, the mother of *Julia Pope*, for £50. He had no other property except his furniture, and he was being pressed by his creditors. Among other debts, he owed £489 to Messrs. *Gurney*, his bankers at *Norwich*, and £7 8*s*. 6*d*. to a postmaster. On the same 3rd of March, 1863, he borrowed from Mrs. *Walpole* £350, for which he gave her a bill of sale of his furniture. Mrs. *Walpole* was privy to, and one of the trustees of, the settlement. At the same time he made an arrangement with his bankers that his solicitor, Mr. *Copeman*, should receive certain income from the benefices, and pay out of it £50 each half-year towards discharge of the balance. The banking account at *Norwich* was to remain

(1) 3 D. J. & S. 293. 11 Jan 1870

L. C.
and L. J. G.
1870

FREEMAN
v.
POPE.

a dead account, and to be discharged, with interest, by the above instalments. A new account was to be opened with the *Aylsham* branch of the same bank, and *Copeman* was to pay the residue of the income (after deducting the £50) to this new account, which was to be an ordinary current banking account.

At the testator's death, in April, 1868, the balance of £489 due to the bankers had been reduced to £117 by means of the annual instalments of £50. The *Aylsham* account shewed no balance on either side. The postmaster's debt of £7 8*s.* 6*d.*, and Mrs. *Walpole*'s £350, with an arrear of interest, remained unpaid. The other debts due at the date of the settlement had been paid. The settlor, however, owed many debts subsequently contracted, and there were no assets whatever to pay them; the furniture having been sold under a subsequent bill of sale, to which Mrs. *Walpole* had agreed to postpone her security.

The Plaintiff, a tradesman who had supplied goods to the settlor after the date of the settlement, filed his bill for administration of the settlor's estate, and to set aside the settlement, to the benefit of which the Defendant *Pope* had become entitled under an appointment by *Julia Pope*.

Vice-Chancellor *James* made a decree for setting aside the settlement (1), from which *Pope* appealed.

Mr. *Morgan*, Q.C., and Mr. *H. A. Giffard*, for the Appellant:—

The settlor here was solvent after making the settlement, and this creditor cannot set it aside. *Spirett* v. *Willows* (2) draws a distinction between the case which a creditor who was such at the date of the settlement must make, from that which a posterior creditor must make. The Lord Chancellor thought it enough for the former to shew that he has been delayed by the settlement—a view not necessary to the decision of the case, and which may well be questioned; but he never said that a subsequent creditor stood on that footing. He must shew either actual intention to defeat creditors, or that the settlor's remaining property was insufficient to pay the then creditors. *Holmes* v. *Penney* (3) puts the rule of the Court on this subject in a clear light. All the cases

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(1) Law Rep. 9 Eq. 206.

(2) 3 D. J. & S. 293.

(3) 3 K. & J. 90, 99.

11 Jan 1870

L. C.
and L. J. G.
1870
FREEMAN
v.
POPE.

are consistent with this: *Stevens* v. *Olive* (1); *Richardson* v. *Smallwood* (2); *Skarf* v. *Soulby* (3); *Thompson* v. *Webster* (4); *Townsend* v. *Westacott* (5). *Jenkyn* v. *Vaughan* (6) decides only this, that the existence of a prior debt enables a subsequent creditor to file a bill; it does not decide that he need only prove the same case as the prior creditor.

[They also referred to *Stokoe* v. *Cowan* (7).]

Mr. *Kay*, Q.C., and Mr. *Cozens-Hardy*, for the Plaintiff, were not called upon.

LORD HATHERLEY, L.C.:—

The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be cases—

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(1) 2 Bro. C. C. 90.
(2) Jac. 552.
(3) 1 Mac. & G. 364, 375.
(4) 4 De G. & J. 600, affirmed in D. P. 7 Jur. (N. S.) 531; 9 W. R. 641.
(5) 2 Beav. 340, 344.
(6) 3 Drew. 419. 2 Jur. N.S. 1[illegible]
(7) 29 Beav. 637. 7 Jur. N.S. 901

(4) S.C. 5 Jur. N.S. 921

L. C.
and L. J. G.
1870
FREEMAN
v.
POPE.

of which *Spirett* v. *Willows* (1) is an instance—in which there is direct and positive evidence of an intention to defraud, independently of the consequences which may have followed, or which might have been expected to follow, from the act. In *Spirett* v. *Willows* the settlor, being solvent at the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

The circumstances of the present case are these: The settlor was pressed by his creditors on the 3rd of March, 1863. He was a clergyman with a very good income, but a life income only. He had a life-annuity of between £180 and £190 a year, and besides that he had an income from his benefice—his income from the two sources amounting to about £1000 a year. But at the same time his creditors were pressing him, and he had to borrow from Mrs. *Walpole*, who lived with him as his housekeeper, a sum of £350 wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her as security the only property he had in the world beyond his life income and the policy which is now in question, namely, his furniture, and a copyhold of trifling value. It is said, however, that the value of the furniture exceeded (and I will take it to be so) by about £200 the value of the debt which was secured to Mrs. *Walpole*. That debt may be put out of consideration, not only on that account, but because Mrs. *Walpole*, being herself a trustee of the settlement which is impeached, cannot be heard to complain of that settlement. But he also owed at the time of this pressure a debt of £339 to his bankers at *Norwich*, and he required, for the purpose of clearing the pressing demands upon him, not only the sum which he borrowed from Mrs. *Walpole*, but an additional sum of £150, which sum the bankers agreed to furnish, making their debt altogether, at the date of the execution of this settlement, a debt of £489. They made with him an arrangement (which probably was intended, in a great measure, as a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long), that they would for the present (for it cannot be held to be more than a present arrangement) suspend the proceedings, which, it appears, they were contemplating, upon his allowing his solicitor to receive part of his income, pay £100 a year towards liquidating the £489 (which was to be carried to what is called a "dead account"), and pay the residue into their branch bank at *Aylsham*, to an account upon which the settlor might draw. That arrangement was made, but there was no bargain on the part of the bankers that they would not sue at any time they thought fit; and, on the other hand, they had nothing in the shape of security for the payment of their debt, for they had not taken out sequestration, and there could be nothing in the shape of a charge upon the living except through the medium of a sequestration. When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him. It appears that a payment of the tithes was made in January, and we cannot suppose that there was more owing to him than the £200 which was paid in May, two months after the date of the deed; and if we add to that £200 as the surplus value of the furniture, and add something for an apportioned part of the annuity, the whole put together would not meet the £489. He,

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(1) 3 D. J. & S. 293. 11 June 1870

L. C.
and L. J. G.
1870
FREEMAN
v.
POPE.

in truth, was at that time insolvent; and there I put it more favourably than I ought to put it, because he could not at once put his hands upon that sum, so as to apply it towards satisfying the debt, at any time between March and May. The case, therefore, is one of those where an intention to delay creditors is to be assumed from the act.

The Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett* v. *Willows* (1), and the *dicta* of Lord *Westbury* in that case. The first of those *dicta* is: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but, at all events, it is unnecessary to resort to it in the present case. It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to shew that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them. It makes no difference that Messrs. *Gurney*, the bankers, seem to have been willing to forego the immediate payment of their debt; the question is, whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in the debt and overturned the settlement? Beyond all

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(1) 3 D. J. & S. 293, 302. 11 Jur ns 70, 71

L. C.
and L. J. G.
1870

FREEMAN
v.
POPE.

doubt they could, on the ground that it did not leave sufficient property to pay their debt; and this being so, we are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right.

Then as to the costs. I think that the expense of separating them would come to more than the mere costs of administration. It was urged that this is an administration suit, as well as a suit to set aside the deed, and that, therefore, the Respondent ought not to have all the costs; but the costs of an administration summons would be trifling, and the costs of the suit are in reality those which have been incurred by the question as to the validity of the deed. The appeal must, therefore, be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

4 Eq 194
10 Ch D 393

In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Spirett* v. *Willows* (1) are taken as abstract propositions, they go too far and beyond what the law is; but if they are taken in connection with the facts of that case, then undoubtedly there is abundantly enough to support the decision, for there was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realised the rest of his property and denuded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved—that is, in such cases as *Holmes* v. *Penney* (2), and *Lloyd* v. *Attwood* (3), where the instruments sought to be set aside were founded on

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(1) 3 D. J. & S. 293, 302. 11 Jur. N.S. 70 (2) 3 K. & J. 90. 3 Jur. N.S. 8
(3) 3 De G. & J. 614. 5 Jur. N.S. 1322

L. C.
and L. J. G.
1870

FREEMAN
v.
POPE.

16 Ch. D. 64

valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

Now in this case, at the date of the settlement, Mr. *Custance* was really insolvent; and if at the date of the settlement the bankers had insisted on payment, and had issued execution, they could not have got a present payment unless they had resorted to that particular policy. That being so, it seems to me that the facts of this case bring the matter entirely within all the decided cases, and it is enough to say that at the date of this settlement Mr. *Custance* was not in a position to make any voluntary settlement whatever.

That being so, the appeal must be dismissed, and dismissed with costs, as I can see no reason for saying that the decree was not right in giving the whole costs of the suit. There was, previously to this case, a decision by Vice-Chancellor *Kindersley* (*Jenkyns* v. *Vaughan* (1),) laying down the rule that where a subsequent creditor institutes a suit and proves the existence of a debt antecedent to the settlement, he can maintain a suit such as this, and therefore it is not a new case. There can be no reason for doubting the correctness of that decision, either in point of principle or justice.

Solicitors: Messrs. *Turner & Turner*; Messrs. *Paterson, Snow, & Burney*.

(1) 3 Drew. 419. 2 Jur. N.S. 109

L. C.
and L. J. G.

1870

Jan. 27;
Feb. 9.

7 Eq 388

GIFFARD *v.* WILLIAMS.

Partition—Legal Title—Action at Law—Hearing of Appeal.

When the Plaintiff, claiming as a tenant in common at law, has been out of possession for many years, and has not clearly shewn his title, the Court will not decide the question of title in a partition suit, but will leave the Plaintiff to establish his title at law.

On an appeal by a Defendant the leading counsel for the Defendant begins; the evidence of the Plaintiff is then read; the evidence of the Defendant is then read; the junior counsel for the Defendant is then heard; the counsel for the Plaintiff are then heard; counsel for the Defendant replies.

SC at hearing on trial at law WN (72) 87. TLW

THE bill in this case was filed by persons claiming under the will of *William Giffard*, and prayed for a declaration that the Plaintiffs, as owners of *Plas Ucha* estate, were entitled to an undivided moiety of a field called *Werglodd-Fadog*, in the county of *Flint*, and for a partition of the field. The title alleged by the Plaintiffs was a legal title; they had not been in actual possession for many years; and for many years the rent had been paid to the Defendants by the tenant of the field; but a payment of £2 a year had, for fifty years and upwards, been made to the owners of the *Plas Ucha* estate, by the owners of the *Tyntroll* estate, which belonged to the Defendants or those under whom they claimed; and the Plaintiffs alleged that these payments had been made as rent for the moiety of the field; the Defendants alleged that it was a quitrent on their estate generally. Other allegations were made on each side, and a great quantity of documentary evidence was produced on each side.

The Vice-Chancellor *Stuart* made a declaration that the Plaintiffs were entitled, and decreed a partition as reported (1).

The Defendants appealed.

Mr. *Morgan*, Q.C., for the Appellants, contended that the Court ought not to entertain a partition suit when the Plaintiffs' claim was disputed and was certainly very doubtful. The question was purely legal, and the Plaintiffs ought to be left to establish their right at law. The Act 25 & 26 Vict. c. 42 did not apply, as its operation in such a case is excluded by sect. 4. The onus of making out their case was on the Plaintiffs.

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(1) Law Rep. 8 Eq. 494.

[There was some discussion as to the order of proceeding, which resulted as follows:]

The evidence of the Plaintiffs was read by their counsel.

The evidence of the Defendants was then read by their counsel.

Mr. *Ignatius Williams*, of the Common Law Bar, was then heard for the Defendants, following Mr. *Morgan*.

Mr. *Fry*, Q.C., and Mr. *Hardy*, Q.C., were then heard for the Plaintiffs.

LORD HATHERLEY, L.C., said that it would not be proper for this Court, under colour of making a decree for a partition, in fact to decide the legal right to this land. The Plaintiffs had certainly not been in possession for many years, unless it could be shewn that the payment of £2 annually by the Defendants to the Plaintiffs and those under whom they claimed was made in respect of this land. The Defendants had exercised all the rights of owners, and there was nothing to shew any tenancy in common except the payment of this £2. The evidence was not in their Lordships' opinion conclusive, and the question must be decided by a jury. The order would be to retain the bill for a year with liberty to the Plaintiffs to bring such action as they might be advised. No costs of the appeal.

SIR G. M. GIFFARD, L.J., concurred.

Solicitors for the Plaintiffs: Messrs. *Futvoye & Flower*.
Solicitor for the Defendants: Mr. *J. Whitehouse*.

L. J. G.
1870
March 18.

PEEK *v.* SPENCER.

Practice—Amendment—Adding Plaintiff.

A bill was filed against the lord of a manor by a Plaintiff, on behalf of himself and all the other freehold and copyhold tenants of the manor, the Plaintiff being at the time aware that there were enfranchised copyholders of the manor who might have similar rights against the lord:—

Held, that the Plaintiff could not obtain leave to amend by adding as co-Plaintiff one of the enfranchised copyholders.

Order of the Master of the Rolls discharged.

THE original bill in this case was filed on the 1st of December, 1866, by *H. W. Peek*, "on behalf of himself and all other the freehold and copyhold tenants of the manor of *Wimbledon*," against Earl *Spencer:* and alleged, amongst other things, that the Plaintiff was a freehold tenant of the manor of *Wimbledon*, and was also a copyhold tenant of the same manor; that the freehold and copyhold tenants of the manor, and particularly the Plaintiff, had certain rights over the common of the manor, which contained above 1000 acres of land; that there were enfranchised copyholders who had also rights; that the Defendant, as lord of the manor, had lately encroached on the common, and claimed a right to enclose parts of the common; and the bill prayed declarations as to the rights of the Plaintiff, and the other freehold and copyhold tenants of the manor, over the common, and that the Defendant might be restrained from encroaching upon or inclosing the common.

Earl *Spencer*, in August, 1868, put in his answer to this bill, denying the title of the Plaintiff; and in the answer it was stated that on the rolls, in many instances, enfranchised copyholders had been treated as original freeholders.

On the 28th of January, 1870, the Plaintiff took out a summons for leave to amend by adding the name of the Rev. *E. Huntingford* as co-Plaintiff, or otherwise, and filed an affidavit in support of the summons, to the effect that the Plaintiff had been advised to amend his bill by adding or substituting words to the description of the class on whose behalf this suit was instituted—such as to include therein all persons who, being owners of land formerly copyhold of the said manor of *Wimbledon* (but now enfranchised), were entitled to the commonable and other rights claimed by the bill, and by adding the name of the Rev. *E. Huntingford*, clerk, as a co-Plaintiff in this suit, and by making sundry other amendments in the bill; that unless such amendments were made, the rights of the said enfranchised copyholders could not be protected in this suit, or without another suit being instituted on behalf of the said enfranchised copyholders—a course the adoption of which would occasion great additional expense; and that the concurrence of the said *E. Huntingford* as co-Plaintiff was necessary for the complete and perfect representation of the class of persons entitled to the rights claimed by the Plaintiff in this suit.

The summons was adjourned into Court, and the Master of the Rolls gave the Plaintiff leave to make the amendments, considering that the case proposed to be made by the amended bill was substantially the same as that made by the original bill.

The bill was accordingly amended, and, as amended, was by *H. W. Peek* and the Rev. *E. Huntingford*, "on behalf of themselves and all other persons who, being owners of lands and tenements, freehold or copyhold, or formerly copyhold, of the manor of *Wimbledon*, in the county of *Surrey*, are respectively entitled to the commonable and other rights hereinafter mentioned, except the Defendant hereto." The bill was further amended by the introduction of statements shewing the title of Mr. *Huntingford* to certain lands now freehold formerly copyhold.

The Defendant now moved, by way of appeal, that the order might be discharged, and the amendments struck out.

Mr. *Jessel*, Q.C., and Mr. *C. T. Simpson*, for the Defendant:—

It is clear that an amendment of this kind would not have been allowed formerly, and no alteration has been made in the practice, except that misjoinder of Plaintiffs is no longer a fatal defect. It is clear from some of the statements in the bill that *Peek* at the time when the original bill was filed was aware of the existence of these enfranchised copyholders and of their rights. The case made by the original bill related to another class of rights, and the Defendant may, for the purposes of those rights, have admitted

L. J. G.
1870
PEEK
v.
SPENCER.

things which he would not have admitted in a different suit, and which are not true. [They cited *Milligan* v. *Mitchell* (1).]

Mr. *Joshua Williams*, Q.C., and Mr. *Whately*, for the Plaintiff:—

It does not follow, from the statements in the original bill, that the Plaintiff when he filed it was aware of all the facts as to the rights of the enfranchised copyholders. The bill is not by *Peek* alone, but by him on behalf of all the other freehold and copyhold tenants. The Defendant was in possession of all the evidence, and the Plaintiff could not know the true state of the manor until the answer came in. It appears in the answer that the lord has treated enfranchised copyholders as freeholders, and it is he who has thus caused the difficulty of the Plaintiff.

SIR G. M. GIFFARD, L.J. :—

As regards the merits of the case, there was certainly a knowledge by the Plaintiff of the existence of enfranchised copyholders at the time when his original bill was filed. Then the answer was put in, and the original Plaintiff's title was as distinctly put in issue, and as distinctly controverted as it is possible that a Plaintiff's title can be; and the only allegations in the affidavit made on the application for leave to amend are, in effect, that the bill is defective for want of parties. I do not object to his amending as to the persons on whose behalf he sues, but what I do object to is the introduction of a new Plaintiff with a new and distinct title. I do not think it would be just towards the Defendant. The Master of the Rolls seems to have thought that the cases were very nearly identical, but I do not consider that the cases are identical, where the right of each depends upon totally different and distinct proofs, and upon totally different and distinct titles; in fact, Mr. *Peek* may possibly fail in the proof of everything, and yet Mr. *Huntingford*, because his name is added to the bill, may sustain it. Under those circumstances, I do not think it right that the name of a new Plaintiff should be added. I agree that leave should be given to make the other amendments; therefore I propose to make a new order, striking out Mr. *Huntingford's* name as Plaintiff, and also the amendments made pursuant to the order appealed from and

(1) 1 My. & Cr. 433.

L. J. G.
1870
PEEK
v.
SPENCER.

consequent on Mr. *Huntingford* being made a party; and giving the Plaintiff, by consent, leave to amend his bill within a limited time, as he may be advised; the costs of the appeal must be costs in the cause, and the Defendant is not to take any objection for want of parties by reason of an enfranchised copyholder not being a party.

Solicitors for the Plaintiff: Messrs. *Fawcett, Horne, & Hunter.*
Solicitors for the Defendant: Messrs. *Frere, Cholmeley, & Co.*

GUEST *v.* SMYTHE.

L. J. G.
1870
May 3.

Vendor and Purchaser—Sale by Court—Setting aside Purchase—Fiduciary Position—Solicitor—Particulars—30 & 31 Vict. c. 48, s. 7.

[illegible]
20 [illegible] 79
21 Ch D 85

Property sold in a foreclosure suit was purchased by *W.*, a solicitor, whose name appeared on the particulars of sale as one of several solicitors from whom particulars of sale could be obtained. He was not solicitor to any of the parties to the suit, but was solicitor to some creditors of the mortgagee, one of whom had obtained a decree for administration of the mortgagee's estate. *W.* had two days before the sale taken out a summons to obtain leave for the Plaintiff in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, and did not know what was the amount of the reserved bidding:—

Held (reversing the decision of the Master of the Rolls), that *W.* was not disqualified from purchasing, for that his client was at liberty to purchase, and therefore his being her solicitor did not disqualify him; and that the mere fact of his own name appearing on the particulars of sale as a person from whom copies of them might be obtained was not a disqualification:

Held, that if *W.* had stood in such a fiduciary position as to be disqualified from purchasing, the statute 30 & 31 Vict. c. 48, s. 7, would not have been a bar to setting aside the purchase, though absolutely confirmed.

THIS was a motion by way of appeal from an order of the Master of the Rolls, setting aside a purchase made by the Appellant of Lot 1 of the property sold in the cause.

The suit was instituted in 1863, by *Benjamin Gibbons*, a mortgagee for £8000, and *Joseph Guest*, his submortgagee, against the persons interested in the equity of redemption of the mortgaged property. *Benjamin Gibbons* having died, the suit was revived by *Emily Gibbons*, his legal personal representative. After his death

L. J. G.
1870
GUEST
v.
SMYTHE.

Miss *Elizabeth Gibbons*, a creditor, instituted a suit of *Gibbons* v. *Gibbons*, for the administration of his estate, in which a decree was made for administration. Mr. *Wight* was solicitor for the Plaintiff in that suit, and he also became solicitor for the Plaintiff in another creditors' suit of *Berry* v. *Gibbons*, in which a decree had been made for administration of the same estate. Mr. *Wight* thus had the conduct of the proceedings in those two suits.

On the 23rd of January, 1865, a decree was made in *Guest* v. *Smythe* directing a sale in case of nonpayment of what should be found due on the mortgage.

Considerable delay having occurred in working out this decree, the parties to *Gibbons* v. *Gibbons* became desirous of intervening in *Guest* v. *Smythe*. On the 19th of April, 1869, Mr. *Wight* applied, in *Gibbons* v. *Gibbons*, for leave to apply in *Guest* v. *Smythe* for an order enabling Miss *Gibbons* to attend the proceedings, which leave was given. On the 13th of July, 1869, Mr. *Wight* had an interview with Mr. *Canning*, a member of the firm of *Coldicott & Canning*, the country solicitors of the Plaintiffs in *Guest* v. *Smythe*, who consented to Mr. *Wight* obtaining an order for leave for Miss *Elizabeth Gibbons* to attend the proceedings in that cause; and accordingly, on the 27th of July, 1869, Mr. *Wight's* agent took out a summons for Miss *Elizabeth Gibbons* to have liberty to attend the proceedings in *Guest* v. *Smythe*. This summons was returnable on the 30th, and on that day the order was made, but was dated the 4th of August, in consequence of delay in obtaining an affidavit of service on some of the parties. No person attended any appointment in *Guest* v. *Smythe* on behalf of Miss *Elizabeth Gibbons* until after this order had been made.

In the meantime, on the 29th of July, the mortgaged property was put up for sale. Mr. *Wight* had in no way intervened in the preparations for the sale. The particulars were prepared by the solicitors of the Plaintiff in *Guest* v. *Smythe*, without Mr. *Wight* being in any way consulted, and a reserved bidding of £5600 was fixed for Lot 1, without his knowing the amount. On the printed particulars and conditions of sale which were issued was this notice: "Particulars and conditions of sale may be obtained in *London*, of the following solicitors, . . . and, in the country, of

Messrs. *Coldicott & Canning, Dudley*; Mr. *Thomas Wight, Dudley*; Messrs. *Hodgson & Son, Birmingham*, and of the auctioneer."

Mr. *Wight* attended at the sale, and bid in person for Lot 1, which was knocked down to him at £6110. The Chief Clerk certified the result of the sale on the 3rd of August, and the certificate was signed and approved by the Judge on the 9th.

On the 27th of November, a summons was taken out by a person interested in the estate, but not a party to the cause, that, notwithstanding the expiration of the time, the certificate might be varied so as to declare Mr. *Wight* not a purchaser. This summons was afterwards amended by making it a summons on behalf also of some of the Defendants. The Master of the Rolls made an order directing the property to be put up for sale at £6110—*Wight* to be the purchaser, if no one bid more than that sum (1).

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(1) 1870. Mar. 12.

LORD ROMILLY, M.R. :—

I wish to consider this case before I finally dispose of it; but I will state now what I consider to be the principles affecting cases of this description. I do not think that the confirmation of the sale affects the question, there not having been unreasonable delay or acquiescence. I consider the case to depend on the principle laid down by Sir *John Leach* in *Grover* v. *Hugell* (3 Russ. 428); that the question is this—was it the duty of Mr. *Wight* to give his aid to the procuring of the best possible price? If it was his duty to do so, then he could not buy. So in *Re Bloye's Trust* (1 Mac. & G. 488), it is expressly laid down that the solicitor who conducts the sale cannot become the purchaser without full explanation to the vendors, and informing them that he is to become the purchaser; and in the course of that case, Lord *Cottenham* refers to the opinion of Lord *Eldon*, that a man who cannot himself buy cannot give another person authority to buy. First, therefore, I have to consider what was the position of Mr. *Wight*. He was the solicitor of certain creditors of Mr. *Gibbons*, and in that character was employed to take steps for the purpose of intervening in the suit, and having some management in the suit, for which purpose he obtained an order, though not until a day or two after the sale. That, however, was his character; he therefore was representing the creditors in the cause. The sale was clearly a sale on behalf of the persons interested in the mortgage. It was for the purpose of all the creditors, therefore, and they were as much interested in its being a good sale, in order that there might be sufficient to pay them, as any other person; and Mr. *Wight* was their solicitor, and only their solicitor. Now, they could not have appointed a person to purchase the property without the leave of the Court; I mean, they could not, in their character of creditors, have appointed a person to purchase. Mr. *Wight* applied to intervene on their behalf, and I consider that when his name was added as one of the solicitors for the vendor, he was to act on their behalf, and to make the sale as effective as it could be for them. That being his character, I

L. J. G.
1870
GUEST
v.
SMYTHE.

Mr. *Jessel*, Q.C., and Mr. *Bagshawe*, for the Appellant:—

After a purchase under the direction of the Court has been confirmed, it cannot be set aside, unless there be fraud, negligence,

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do not think he was in a situation in which he was able to buy. In *Grover* v. *Hugell* (3 Russ. 428), a purchaser of land which had formerly been part of the glebe of a rectory, and had been sold for the redemption of the land-tax, was held not bound to complete the purchase, because it appeared that on the sale for the redemption of the land-tax the rector himself had been the actual purchaser in the name of the curate. Sir *John Leach* says: "The general rule in Equity is, that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was to obtain the best possible price for the land sold, and his interest as purchaser was to pay the least possible price for it. It is no answer to say that the superintendence of the Commissioners would secure a full price. The sale is to be by public auction, and before two of the Commissioners, or some person appointed by them, and their approbation of the sale is required by the Act. But still the duty of the rector was to give his aid to the procuring of the best possible price." I consider that every one of those observations applies on the present occasion. It was the duty of Mr. *Wight* to give all his assistance to obtaining the best possible price, and his name was put upon the list as one of the solicitors for that purpose. I do not assent to the observation which has been made by Mr. *Swanston*, with reference to inserting the name of an hotelkeeper where the transaction was to take place, that the mere fact of the name appearing upon the particulars of sale would prevent that person from buying; because the observation is this: when information is to be obtained from the solicitors, it is assumed that those are the solicitors for the persons interested in the sale—interested in obtaining the highest possible price that can be obtained for it; and I am of opinion that Mr. *Wight's* duty was, on behalf of the creditors, to obtain the highest possible price, and to do everything for that purpose, and that in that situation he was not competent to buy. I will look further into the matter, but that is the view I at present take of the case; and the same principle is laid down by Lord *Langdale*, in *Greenlaw* v. *King* (3 Beav. 49). I agree in the observation made by Mr. *Jessel*, that this is a question of great importance; but it appears to me to turn on the question whether a person whose duty it is to assist in obtaining the highest possible price can become the purchaser. Observe what might in many cases be the effect of a bidding by a person in Mr. *Wight's* position. Upon seeing the person bid whose name was put on the particulars as one of the solicitors concerned in the sale, people might suppose that the property was bought in, and that it was not an effectual sale. I am therefore disposed to think, that the proper order will be to direct a new sale of the property; but in that case I ought to give leave to amend the summons, or to take out another summons for that purpose. If the matter is carried further—which is very likely, as it is a case of very considerable importance—I will put it in such form that every facility shall be open for taking the opinion of the Court of Appeal.

On the 17th of March His Lordship adhered to these views, and made the order under appeal.

L. J. G.
1870
GUEST
v.
SMYTHE.

surprise, or fiduciary position: *Morice* v. *Bishop of Durham* (1); *White* v. *Wilson* (2); *Executors of Fergus* v. *Gore* (3). There are none of these here. *In re Carew's Estate* (4), *Watson* v. *Birch* (5), *Gower's Case* (6), there cited, and *Thornhill* v. *Thornhill* (7), all illustrate the same principle. The Master of the Rolls said he made it a rule that no solicitor whose name appeared on the particulars should bid, but the cases shew no trace of such a rule. The rule is, that no person who stands more or less in the position of a vendor shall buy, as in *Lister* v. *Lister* (8). Here *Wight* had nothing to do with the sale, and his clients had no claim against anything but the mortgage-money. The statute 30 & 31 Vict. c. 48, s. 7, prevents the sale being opened; and even apart from that statute it ought not to be opened after such delay.

Mr. *Southgate*, Q.C., and Mr. *Simmonds*, for the Defendants who had obtained the order:—

We submit that the rule of the Master of the Rolls is a sound one, that no solicitor whose name appears on the particulars can bid. He is thus held out as being in a fiduciary position, and his bidding damages the sale. He is estopped from saying that he is not acting on behalf of the vendors. A purchase by any one in a fiduciary position is voidable at the option of the parties beneficially interested in the purchase-money: *Ex parte Hughes* (9); *Lister* v. *Lister*; *Campbell* v. *Walker* (10). The statute does not apply; it was not intended to affect the case of a person who was under a personal disqualification to become a purchaser.

Mr. *Swanston*, Q.C., and Mr. *Bovill*, for the Plaintiffs.

Mr. *Bagshawe*, in reply.

SIR G. M. GIFFARD, L.J.:—

In the view that I take of this case, it is unnecessary for me to express any opinion as to the effect of the statute 30 & 31 Vict.

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(1) 11 Ves. 57.
(2) 14 Ibid. 151.
(3) 1 Sch. & Lef. 350.
(4) 26 Beav. 187. 4 Jur. N.S. 1290
(5) 2 Ves. 51.
(6) 6 Bro. P. C. 148.
(7) 2 Jac. & W. 347.
(8) 6 Ves. 631.
(9) Ibid. 617.
(10) 5 Ves. 678.

L. J. G.
1870
GUEST
v.
SMYTHE.

c. 48, beyond saying this—that I should not consider myself in the least degree precluded by it from opening this sale, if I were of opinion that Mr. *Wight* was at all in the position of the vendor's solicitor, or of a solicitor who had been consulted about the purchase, or who was selling, or who owed any duty to any person in the cause in respect of the sale. Certainly the case is of considerable importance. On the one hand, it is of great importance that the rules of the Court on this subject should in no way be relaxed; but, on the other hand, it is equally important that sales by the Court should not be more easily impeached than ordinary sales. As regards the rules of this Court, it is, of course, well known that a person who has the conduct of a sale under the direction of the Court cannot himself buy; and, of course, it is equally well known that, as he cannot buy, his solicitor cannot buy. It is equally well known that parties to the suit cannot buy without the special leave of the Court; and, because they cannot buy, their solicitor also cannot buy. There are also other well-known rules—such as, that a trustee for sale, an assignee under a bankruptcy, or the solicitor of an assignee, cannot buy; and, generally speaking, that where a man's duty and interest in respect of the purchase conflict he cannot become a purchaser. If I thought that this case came within any one of those well-established rules, I should undoubtedly affirm the decision under appeal. But I must confess that, looking at the whole of this case, I think that to affirm the decision would be carrying those rules to such an extent as to render it difficult to say where we are to stop, and perhaps deter the persons who would be most likely to give a good price from bidding for a property put up for sale by the Court. The facts of the case are these:—As regards Mr. *Wight*, he was not a solicitor to any party to the cause. He was solicitor to Miss *Elizabeth Gibbons*, who was not a party to this suit, but was Plaintiff in a creditors' suit for the administration of Mr. *Gibbons'* estate. The particulars of sale were not prepared by Mr. *Wight*, nor was he even consulted about them. There was a reserved bidding fixed, but Mr. *Wight* had nothing to do with fixing it. He did not know what it was, nor had he the means of getting that knowledge. The only connection he had with the suit was this:—He being the solicitor for Miss *Elizabeth Gibbons*, and the solicitor for other creditors of Mr. *Gibbons*, had, on the 13th of July, an interview with Mr. *Canning*, at which it was arranged that he should obtain an order to attend the proceedings in the suit; and two days before the sale—he having, some weeks before, obtained in the creditors' suit an order enabling him to make the application—a summons was taken out for the purpose of giving Miss *Elizabeth Gibbons* leave to attend the proceedings, he being her solicitor. The sale took place, and at the time when it took place I do not hesitate to say that Miss *Elizabeth Gibbons* could have bought, and, beyond all question, any one of the creditors of Mr. *Gibbons* could have bought. If that be so, why could not Mr. *Wight* buy?—the only reason against his doing so being (except his name appearing in the particulars), that he was the solicitor of Miss *Elizabeth Gibbons*, and had intervened to the extent which I have already stated. After the sale had taken place—the sale being at a reserved bidding, there not being a tittle of evidence that the sale was in any way misconducted, or that a single person present abstained from bidding through supposing that Mr. *Wight* was a person who had peculiar knowledge, or who stood in a fiduciary relationship:—after the sale, true it is that in Chambers (not Mr. *Wight* himself, but, I suppose, his town agent, appearing for Miss *Elizabeth Gibbons*), an order, or rather a memorandum, in the Chief Clerk's book was made, giving Miss *Gibbons* leave to attend; but no order was drawn up till the 4th of August, the result of the sale having been certified on the 3rd, and there is no attendance on behalf of Miss *Gibbons* until after the date of the order of the 4th of August. Under these circumstances, if the matter stood there, can I possibly say that persons in the position of the creditors of Mr. *Gibbons*—who had nothing to do with the conduct of the sale, had nothing to do with the preparation of the particulars, and who were not consulted in any degree—can I say that they could be precluded from purchasing? If they were not precluded from purchasing, why should their solicitor be precluded, this application being not by them against their own solicitor, but by parties in the cause who had all the means of seeing that the particulars were properly prepared, and all the means of seeing that a proper reserved bidding was fixed, and that the sale was properly conducted?

L. J. G.
1870
Guest v. Smythe.

That being so, the only question that really remains is the question of the reference on the particulars of sale. Now, is this to be laid down (because that is what it really amounts to), that in the case of a sale by the Court, if in the conditions of sale—which conditions shew who the vendor's solicitors are—there is this representation, "Printed particulars and conditions of sale may be had in *London* of the following solicitors" (naming them), "and in the country of the following solicitors" (naming them), then, if any one of the solicitors thus referred to as persons who will supply particulars or conditions of sale—he not having been consulted, not being responsible, not having any right to interfere with the conduct of the sale in the smallest degree—happens to bid (and you must extend it to whether he bids for himself or for his client), parties to the suit can, even after the confirmation of the purchase, come to set aside the sale? I think that the laying down such a rule is not at all essential for the ends of justice, and not at all essential for the purpose of insuring a fair sale, but, on the contrary, would tend to depreciate sales by the Court. Certainly, if this was a sale, not by the Court, but in the ordinary way, no such rule could be applied; and why should it be applied to sales by the Court? I think that to do so would be extending the rules of the Court beyond all reason; and that being so, I am of opinion that this order ought to be discharged. With respect to the costs, I cannot see that Mr. *Wight* has done anything which is in the slightest degree wrong, and the only question about costs is that there are affidavits of unnecessary length.

[His Lordship then (subject to directions for disallowing part of the costs of the affidavits) gave Mr. *Wight* his costs below out of the purchase-money, but gave no costs of the appeal.]

Solicitors: *Palmer, Eland, & Nettleship; Field, Roscoe, & Co.; Combe & Wainwright.*

In re NATIONAL PROVINCIAL MARINE INSURANCE COMPANY.

GILBERT'S CASE.

L. J. G.
1870
June 10.

Company—Director—Transfer to escape Liability—Fraudulent Use of Power to make Calls—Practice—Power of Liquidator—Rectification of Register.

A director of a company is not in the position of a trustee of his shares for the general body of shareholders, and under ordinary circumstances he may deal with them as freely as any other shareholder, provided he does not part with his qualification. But he is a trustee of his power of making calls for the general body of shareholders, and must not use it for his own benefit, without regard to their interests.

5 Ch D 79
794
9 Ch D 32
14 aff Cd
5/0

By the articles of association of a company, the directors had power to refuse to register the transfer of shares until the calls due on them were paid. But this rule was not to apply to a transfer which had been lodged for registration before the call was declared.

On the 17th of April the directors agreed to make a call in order to prevent the transfer of numerous shares which was threatened by some of the shareholders, but the declaration of the call was postponed until the 23rd, when it was formally made. On the 18th of April one of the directors transferred some of his shares to his clerk, under circumstances which shewed that he did so to escape liability; and the transfer was left for registration on the same day, and registered on the 20th, the other directors being cognisant of the transaction. The company was afterwards wound up:—

Held, that inasmuch as it appeared that the formal declaration of the call had been postponed in order to assist the transferor in getting the transfer registered, the registration was void, and the transferor was put on the list of contributories in respect of the shares.

The order of the Master of the Rolls affirmed, but on different grounds.

Whether a liquidator in a voluntary winding-up under supervision has power to rectify the register of shareholders without applying to the Court, *quære.*

THIS was an appeal from an order made by the Master of the Rolls in the winding-up of the *National Provincial Marine Insurance Company, Limited,* whereby he refused to reduce the number of shares in respect of which the Appellant, *George Gilbert,* had been made a contributory from 245 to 120.

By the 26th clause of the articles of association of the company, it was provided that the transferor should remain the holder of shares till the name of the transferee should be entered on the register: by the 27th clause, that on the transfer being executed and presented to the company, along with such evidence as to the title of the transferor and of the execution of the transfer by him as the board of directors might require, the company should register the transferee as a member: by the 28th clause, that the board might decline to register the transfer of any share made by a member indebted to the company: and by the 29th clause, that no transfer, unless with the previous consent of the board, should be made or registered after a call on such share had been made, until the amount of such call, together with the amount of all overdue calls (if any) upon all other shares of the transferor, and the amount of all interest (if any) in respect of such overdue calls, should have been first paid to the company, and that notwithstanding the time appointed for payment of the calls should not have arrived; but the last-mentioned provision was not to apply to any transfer which might have been actually lodged at the office previously to the call being made.

The Appellant was a director of the company, and the holder of 245 shares of £25 each, on which £2 10*s*. had been paid. In April, 1867, the Appellant, wishing to diminish the number of shares which he held, applied to Mr. *Hardy*, a clerk in his employment at a salary of £250 a year, to take 125 of his shares at the market-price, which was then 1*s*. a share. *Hardy* asked him whether it was likely that there would be any calls on the shares, and the Appellant told him that there probably would be, but not exceeding £1 on each share; and that if any call were made, he would lend him the money to pay it. *Hardy* accordingly paid £6 5*s*. to the Appellant, and the transfer to him was executed on the 18th of April, and sent in to the officer of the company on the same day. It was affirmed by the directors, and registered on the 20th of April.

In the meantime the secretary, Mr. *Hodges*, being alarmed at the intention of several of the shareholders to part with their shares, proposed to the directors that a call should be made at once, which would have the effect of preventing their doing so without the consent of the directors, under the 29th clause of the articles of association.

A special meeting of the board was accordingly summoned for the 16th of April. What took place at this and the subsequent meetings was thus narrated in the affidavit of Mr. *Downes*, one of the directors:—On the 16th of April, Mr. *Hodges* explained that he had heard that several shareholders at *Newcastle* intended transferring their shares to men of no means in order to escape from their liability, and he requested that an immediate call should be made in order to frustrate their attempts; but all the directors did not attend, and as this was an important step, the resolution to make a call was not formally passed, and the directors present agreed to postpone actually making the call until the following day—meaning Wednesday, the 17th of April, which was the usual weekly board-day. At the meeting on the 17th of April, *Gilbert* and several other directors being present, Mr. *J. Heald* attended on behalf of the *Newcastle* shareholders. After some discussion it was agreed that a call of £1 10*s.* per share should be made; but at the request of Mr. *Heald*, who wished to confer with the *Newcastle* shareholders, a formal resolution was not passed. Accordingly, another special meeting was summoned for the 20th of April, for the purpose of actually passing the resolution. At the meeting of the 20th of April, at which *Gilbert* was also present, a formal resolution was submitted for making a call of £1 10*s.* on each share, payable by two instalments of 15*s.* each.

Mr. *Downes* also stated that it was generally his duty to examine and pass the transfers that were left for registration, and his affidavit proceeded as follows: "At the said meeting of the 20th of April, 1867, the said *George Gilbert*, *C. F. Ellis*, and *A. Jarvis* (who were also directors), pressed to have certain transfers registered; whereupon some discussion took place whether these transfers ought to be registered, some of the directors contending that as the call was made expressly for the purpose of frustrating such transfers, the directors ought not to sanction such registration; and it was ultimately arranged, at the suggestion of some of the directors, that it would be better to postpone actually making the call in order that *H. A. Coffey*, who was then in *Ireland*, might attend; and it was arranged to telegraph for the said *H. A. Coffey*, and the meeting was rearranged for Friday the 23rd of April. When this was agreed to, the said *C. F. Ellis*, *A. Jarvis*, and *G. Gilbert* then pointed out that the call would not be actually passed and recorded until the 23rd of April, and they again

L. J. G.
1870
Gilbert's Case.

asked to have their transfers registered, as they stated, 'for what they were worth;' and ultimately it was arranged to pass the registration thereof, although some of the directors expressly stated that such transfers were irregular and invalid; and on this understanding I allowed my initials to remain annexed to the particulars of such transfers."

Among the transfers thus passed was the transfer of the 125 shares sold by *Gilbert* to *Hardy*, and *Hardy's* name was accordingly placed upon the register.

On the 23rd of April another meeting was held, at which the resolution to make the call was formally passed.

On the 22nd and 23rd of April various transfers from shareholders at *Newcastle* were lodged for registration, but the directors refused to pass them unless the call of £1 10*s*. was paid. One of the transferees of these shares subsequently applied to the Master of the Rolls to rectify the register and insert his name; but the Court refused the application, considering that the directors were right in refusing to register the transfer (1).

In December, 1867, resolutions were passed and confirmed for winding up the company voluntarily, and in March, 1869, an order was made for continuing the winding-up under the supervision of the Court.

The liquidator removed the name of *Hardy* from the list of contributories, upon which it had been placed in respect of the 125 shares transferred to him, and inserted *Gilbert's* name, thereby increasing his shares from 120 to 245. *Gilbert* accordingly applied to the Master of the Rolls to reduce the number again to 120. His Lordship refused the application, but gave no costs, and from this decision *Gilbert* appealed (2).

(1) *Ex parte Parker*, Law Rep. 2 Ch. 685.

(2) 1870. May 5.

LORD ROMILLY, M.R.:—

I am of opinion that this transfer is not valid, and I will endeavour to make my reasons plain for coming to that conclusion. In the first place, I do not at all mean to dispute the cases which have been decided, that a person who has a certain number of shares in a company which he thinks is turning out ill, may get rid of those shares by selling them to anybody whom he can get to take them, provided there is no fraud committed. Whether a director can do that is a question which has never yet been determined, and I apprehend that he cannot. His situation is that of trustee for the shareholders, and therefore he is not at liberty to do

Mr. *Swanston*, Q.C., and Mr. *Everitt*, for the Appellant:—

The directors have no inherent power to veto transfers: *Weston's Case* (1). The principle of joint-stock companies is that shareholders can get rid of their shares, and their liability with them. In the present case the power of refusal of the directors was confined to the case of shareholders who had not paid their calls. There is no principle on which directors are on a different footing from other shareholders, provided, of course, they do not make use of their position to the injury of the company, or part with their qualifica-

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things which he does not think for the benefit of all the shareholders of the company—still less may he do so to gain pecuniary advantage to himself.

Now, the first question I have to consider is: "Was this a transfer of shares for the purpose of getting rid of the liability?" I do not say there was any fraud in the transaction. It was done quite openly, but that it was done to escape liability is, I think, conclusively proved. [His Lordship then referred to the evidence, and continued]:—I repeat that I am of opinion that a director is not at liberty to get rid of his own liability for the purpose of throwing an increased liability upon his *cestuis que trust*. I never heard that determined, and I certainly shall not be the first Judge to sanction such a doctrine.

Mr. *Swanston* relied upon the fact that in the articles of association there is no power for the directors to refuse a transfer except where the person who makes the transfer is indebted to the company. But I decided in *Ex parte Parker* that there is an inherent right in directors to do what they think reasonable on behalf of their *cestuis que trust*; and although there is no power contained in the articles of association, they have an inherent right and power in them, where they think the transfer is decidedly to the injury of the *cestuis que trust*, to refuse to allow such transfers to be made. The directors did so in that case, and I upheld them, on the ground that they had such inherent right, and Lord Justice *Rolt* seems to have agreed in that conclusion (Law Rep. 2 Ch. 685).

The matter is, therefore, in this position—that not only in my opinion is a director precluded from selling his shares for the purpose of escaping his liability upon his *cestuis que trust*, but the case becomes much stronger when he and the other directors of the company had, in the exercise of that inherent discretion, which in my opinion is vested in them, disallowed a similar transfer by persons who were not directors, thereby placing on record their opinion that transfers under these circumstances were not beneficial to the company, and ought not to be allowed.

[His Lordship, after expressing his opinion that this was not a case in which the acquiescence of the directors could bind the meeting, concluded as follows]:—

I am therefore of opinion that this was an erroneous transfer, and the result is that the liquidator was correct in his view of the case. Whether he was right technically or not, whether he could of his own authority erase the transfer or not, is not, as I understand, the question now raised, and Mr. *Gilbert* must remain a shareholder for the 245 shares.

(1) Law Rep. 4 Ch. 20.

tion. *Gilbert*, therefore, had a right to reduce his number of shares, even though his only object was to escape liability. The transaction was an out-and-out transfer, and there were no suspicious circumstances attending it. The circumstances of the transfer by the *Newcastle* shareholders (1) were very different. Upwards of 600 shares were transferred to a pauper for 5*s*., and the transfer was not lodged till the call had been made. In the present case the shares were sold at the market-price of 1*s*. a share, and the transfer was lodged before the call was passed. The liquidator was wrong, in point of form, in altering the register without applying to the Court for an order to do so. This is only now important on the question of costs; but if we are not successful on the merits, we submit that we ought not to pay costs, as the liquidator could not properly make the alteration without coming to the Court.

[The LORD JUSTICE GIFFARD:—Has it ever been decided that a liquidator must come to the Court in a case of this kind?]

The Master of the Rolls was of that opinion, and for that reason gave no costs in the application. *Ex parte Kintrea* (2) bears upon this question.

Mr. *Bagshawe* (Mr. *Jessel*, Q.C., with him), for the liquidator:—

We do not contend that a director cannot deal with his shares as any other shareholder; but we say that he cannot make his power of making calls subservient to his desire to escape liability. Of that power the directors are trustees for the company, and if they exercise or refrain from exercising it for their own interest they are committing a breach of trust. In the present case the call had been agreed upon on the 17th of April, before *Gilbert's* transfer had been lodged, and there was no reason for postponing it till the 23rd of April, except to get that transfer, and the transfers of the other directors, registered before the call was formally declared. The directors have, therefore, used their power in a fraudulent way, and cannot be allowed to benefit by it.

Mr. *Swanston*, in reply.

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(1) *Ex parte Parker*, Law Rep. 2 Ch. 685.
(2) Law Rep. 5 Ch. 95.

L. J. G.

1870

GILBERT'S CASE.

4 Ch Cas
570

SIR G. M. GIFFARD, L.J.:—

I quite accede to a part of Mr. *Swanston's* argument in this case. I agree that according to *Weston's Case* (1), and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them. I quite agree, also, that because a man is a director he is not necessarily a trustee of the shares he holds for the general body of shareholders; and in a vast variety of circumstances he is just as free to deal with his shares—except perhaps his qualification, which he cannot deal with without giving up his directorship—as any other person.

But those two propositions do not cover this case. Here were directors who had what was unquestionably a discretion to exercise with reference to a fiduciary power—namely, a power to decide whether at a particular time a call ought or ought not to be made; and if at a particular time, namely, on the 17th of April, they had exercised that discretion by saying that a call should be made, then, beyond all question, the shares could not have been transferred as they have been.

With these observations let us now turn to the facts of the case. Mr. *Gilbert*, no doubt, had been talking to, and probably negotiating with, *Hardy* some time before this 17th of April. *Hardy* was a clerk in the service of his firm, and had a salary of £250 a year. But I am satisfied he could not pay at that time, and I am satisfied that Mr. *Gilbert* knew he could not pay, anything like a sum of £500 for calls, because Mr. *Gilbert* himself admits that he promised, in his negotiation with *Hardy*, to lend him the money that was requisite for the purpose of enabling him to pay the call. In that state of things there is a meeting of the directors on the 17th of April, and at that time it is clear that Mr. *Gilbert* was desirous of getting rid of his liability on some of his shares. I have no doubt from the evidence that *Ellis* and *Jarvis* also had the same thing in view, and I have no doubt, also, from what appeared in the evidence, that all the directors must have known that those shares which were in the name of the clerk were shares for which, possibly, the transferor might be held liable. That being so, I will

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(1) Law Rep. 4 Ch. 20.

L. J. G.
1870
Gilbert's Case.

take up the evidence of *Downes* and *Hodges*, and see exactly how matters stood:—[His Lordship then read passages from the affidavits of *Downes* and *Hodges* to the effect before stated, and continued:—]

With respect to what took place on the 20th and 23rd of April, I do not think it material to consider it, for I think that what took place on the 17th is really the key to this transaction. If there had been no proposal of a call antecedently to the time when the transfer to *Hardy* had been sent in (which was on the 18th), possibly the case may have stood in a very different position. But what we have to see is, what was the state of things on the 17th, and what was Mr. *Gilbert's* duty on that day. I will not read the paragraph in Mr. *Hodges*' affidavit, but he goes into detail more than Mr. *Downes*. It is plain to my mind that any directors who were disinterested on this subject, who could exercise their discretion without bias—knowing as they did what was about to be done with reference to the *Newcastle* shareholders, knowing that a call was necessary, knowing that within a few days at all events a call must be made—would on the 17th, if they had any regard to the due interests of their shareholders and of the company, have made the call, as it was their plain duty to do, on that day. I have no hesitation in saying that I can find but one reason why the directors did not make the call on that day, and that reason was that their duty and their interests lay in totally opposite directions; and if persons having to exercise a fiduciary power choose to place themselves in this position, that their interests pull one way while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power, they must be held to all the same consequences as though that power had been exercised. It follows, therefore, as a matter of course, that in this case the Appellant must be held liable in respect of these shares, because, according to the terms of the articles, unless the transfer is left antecedently to the calls being made, the directors are not bound to register the transfer. This transfer was not left until the 18th of April, and I hold that on the 17th Mr. *Gilbert* ought to have done his best to have had the call made, and that all the other directors ought to have done their best to have a call made; and the conclusion I draw from the facts is, that they did not do so because they were desirous at that time, before the call was made, to get rid of their shares in order to escape liability.

L. J. G.
1870
GILBERT'S CASE.

That being so, these transfers are void; and the result is that the appeal must be refused with costs, and the Appellant must also pay the costs in the Court below.

Mr. *Swanston*:—The liquidator must have come to the Court for leave to make the alteration. On this ground the Master of the Rolls gave no costs.

SIR G. M. GIFFARD, L.J.:—I shall act upon the rule which I laid down in such cases when I was Vice-Chancellor, that the party who is wrong must pay the costs.

Solicitors: Mr. *J. E. Carter*; Messrs. *Parker & Clarke.*

In re LONDON AND MEDITERRANEAN BANK.

BOLOGNESI'S CASE.

L. J. G.
1870
June 10.

6 Ch 209.

Company—Disposition of Property pending Winding-up—Companies Act, 1862, s. 153.—*Acceptance of Bill of Exchange.*

After the commencement of the voluntary winding-up of a company, but before the notice of it appeared in the *London Gazette*, one of the directors, who had also been appointed one of the liquidators, accepted a bill of exchange on behalf of the company. He had no special authority to accept the bill for the other liquidators, and no notice appeared on the acceptance that the company was in liquidation:—

Held (affirming the decision of *Stuart*, V.C.), that this was not a disposition of the property of the company under the 153rd section of the *Companies Act*, 1862, and that the holder of the bill could not prove for the amount.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, made in the winding-up of the *London and Mediterranean Bank, Limited.*

The bank, the affairs of which have been several times before the Court, was wound up voluntarily by a resolution passed on the

L. J. G.
1870
Bolognesi's Case.

6th of November, 1865, and confirmed on the 22nd of November. The notice of the resolution appeared in the *London Gazette* of the 26th of November.

On the 24th of November the four liquidators, who had been appointed at the meeting held on the 22nd, met, and passed a resolution that the bank's acceptances should continue to be signed by one of the liquidators and the manager, as theretofore.

In pursuance of this resolution, Mr. *Maxwell*, one of the liquidators, who was also a director, and the manager, accepted several bills, and, among others, on the 25th of November they accepted a bill of exchange for £1000, drawn by *J. P. Gentile*, and dated the 5th of October, 1865. There was nothing on the face of the acceptance to shew that the bank was in liquidation, and Mr. *Maxwell* signed as "director," not as "liquidator." An order was afterwards made to continue the winding-up under the supervision of the Court. In December, 1865, the bill was indorsed for value to Mr. *Bolognesi*, who denied that he had any notice of the winding-up when the bill was indorsed to him. He now claimed to prove for the amount of the bill against the bank. The Vice-Chancellor refused to make any order on the application, and Mr. *Bolognesi* appealed.

Mr. *Swanston*, Q.C., and Mr. *Waller*, for the Appellant, admitted that after the decision in *Ex parte Birmingham Banking Company* (1), they could not support the validity of the acceptance of a bill of exchange by one liquidator without special authority for that purpose. But they submitted that the acceptance of this bill was a disposition of the effects of the company in the ordinary course of business, which might be sanctioned by the Court under the 153rd section of the *Companies Act*, 1862. The acceptance took place before the advertisement of the winding-up in the *London Gazette*, and the persons tendering the bill for acceptance had no notice, either from the form of the signatures of the acceptors or otherwise, that the winding-up had commenced. The whole transaction was perfectly *boná fide* on the part of the drawer and holder of the bill, and was now a completed transaction which the Court could support. They referred to *Ex parte Pearson* (2).

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(1) Law Rep. 3 Ch. 651.

(2) Law Rep. 3 Ch. 443.

L. J. G.
1870
Bolognesi's Case.

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the Liquidators, were not called on.

Sir G. M. Giffard, L.J. :—

This is an attempt to uphold a bill which is not the bill of the company. I am of opinion that the acceptance of this bill was not a "disposition of the property, effects, or things in action of the company" within the meaning of the 153rd section of the *Companies Act*, 1862, and the Court has, therefore, no power to support it on that ground. Under the 5th clause of the 133rd section, all the powers of the directors ceased upon the commencement of the winding-up. The bill was accepted by a person who had no power to accept it, either as director or as liquidator: it was, therefore, not the bill of the company. The appeal must be dismissed, and the Appellant must pay the costs both of the appeal and in the Court below.

Solicitors: Messrs. *Bryan & Dawson;* Messrs. *Lewis, Munns, & Co.*

L. C.
1870
June 29.

WILKINSON *v.* LINDGREN.

Will—Construction—Charitable Gift—Uncertainty—"Any other Religious Institution or Purposes."

A testatrix gave legacies to several charitable institutions, and then gave her residuary personal estate "to and amongst the different institutions, or to any other religious institution or purposes as *A.* and *B.* might think proper":—

Held (affirming the decision of the Master of the Rolls), that the bequest of the residue was a good charitable gift, and not void for uncertainty.

MARY DAVIDSON, by her will dated the 3rd of March, 1840, gave several pecuniary legacies to various persons, and also to the following charitable institutions:—the *Wesleyan Methodist Society*, the *British and Foreign Bible Society*, the *Worn-out Preachers' Fund*, the *Woodhouse Grove School*, the *Kingswood School*, the *Chapel Fund*, the *Wesleyan Methodist Chapel* in *Whitby*, *the Wesleyan Methodist Benevolent Society* at *Whitby*. The testatrix bequeathed her residuary estate to her executors, *Thomas Fletcher* and *James Wilkinson*, upon trust to convert the same into money, and to pay thereout her debts, funeral and testamentary expenses, and also the several legacies thereinbefore bequeathed; and as to the residue or surplus of the money to arise and be produced from her said estate and effects, after making such payments as aforesaid, upon trusts which she declared in the following words: "The trustees to pay and divide the same to and amongst the different institutions, or to any other religious institution or purposes as they the said *Thomas Fletcher* and *James Wilkinson* may think proper, which disposition I leave to their discretion."

The bill was filed by the trustee who had been appointed in place of *J. Wilkinson*, *T. Fletcher* having renounced probate, for the administration of the estate of the testatrix, and a question arose as to the construction of the residuary gift, the next of kin contending that it was void for uncertainty. The Master of the Rolls decided that it was a good charitable gift(1), and the next of kin appealed from his decision.

(1) 5 C Wh (1869) 195 ; 17 W.R. 1000.

L. C.
1870
Wilkinson
v.
Lindgren.

Mr. *Roxburgh*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Phear*, for the next of kin, contended that the word "religious" applied only to "institution," and not to "purposes;" and that the bequest was therefore void for uncertainty. The fact that one word was in the singular and the other in the plural was a proof that the testatrix did not mean the same adjective to apply to both. Some of the charities mentioned in the earlier part of the will were not properly religious institutions, which shewed that the testatrix had in view other objects beyond religious institutions. They referred to *Morice* v. *Bishop of Durham* (1), where the gift was for "objects of benevolence and liberality;" *Ellis* v. *Selby* (2), where the gift was for "charitable or other purposes;" *Vezey* v. *Jamson* (3), where the gift was to "charitable or public purposes, or to any person or persons," in all which cases the bequests were held void; and also to *Baker* v. *Sutton* (4), where the words were "religious and charitable institutions and purposes within the Kingdom of *England;*" *Dolan* v. *Macdermot* (5), where the words were "charities and other public purposes in *Tadmarton;*" and *Townsend* v. *Carus* (6), where the words were "societies, subscriptions, or purposes having regard to the glory of God in the spiritual welfare of His creatures," in which case the bequests were supported as good charitable gifts.

Mr. *Southgate*, Q.C., and Mr. *Bunting*, for the charities named in the will, and

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the Plaintiff, were not called on.

Lord Hatherley, L.C.:—

I do not see how you can carry on the word "other" without carrying on "religious" also. The only argument for a contrary construction which seemed to me at all forcible was that "institution" was in the singular number, and "purposes" in the plural, and that the same adjective could not be intended to apply to both. But there is nothing ungrammatical in such use of an

(1) 10 Ves. 522.
(2) 7 Sim. 352.
(3) 1 S. & S. 69.
(4) 1 Keen, 224.
(5) Law Rep. 3 Ch. 676.
(6) 3 Hare, 257.

L. C.
1870
WILKINSON
v.
LINDGREN.

adjective in the English language, and we constantly use such expressions as "other object or objects." In the present case I think the testatrix has made her intention plain; for she has first given legacies to several institutions, all of which were in connection with the religious body to which she belonged: and whether they were strictly religious institutions or not, I think it is clear that she regarded them as such, for she says, "amongst the several institutions, or any other religious institution." Suppose a person whose peculiar propensity was military, or financial, or medical, left legacies to institutions connected with his favourite subject, and then gave his residue in trust for other "military," or "financial," or "medical institutions or purposes," could there be a doubt that he meant the purposes to be of the same nature as the institutions? The testatrix has properly added the word "purposes," because she considered that religion could be promoted by other modes than by permanent institutions. If she had meant the trustees to have a wider discretion, the use of the words "religious institution" would have been altogether superfluous. I think the gift is a good charitable bequest, and the appeal must be dismissed. As the difficulty was caused by the testatrix, the costs will come out of the residue.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Cooper & Son, Manchester;* Mr. *Masterman;* Mr. *Greaves Walker.*

THOMPSON *v.* DUNN.

L. C.
and L. J. G.
1870
June 7.

Pleading—Answer—Exceptions—Insufficiency.

The widow of a testator carried on his business under a direction in the will that the executors should allow her to carry it on, and to have, while carrying it on, the use of the capital employed in it, and of his other personal estate. After her death, the Plaintiffs, who had supplied her with goods for the purposes of the business, filed their bill against the testator's personal representative, claiming a lien on the funds employed in the trade, and by their interrogatories asked for accounts of the testator's personal estate and of the personal estate employed in the business. The executor declined to set forth the accounts, on the ground that if it should be decided at the hearing that the Plaintiffs had no such lien as they claimed, the discovery would be useless:—

Held (reversing the decision of *Malins*, V.C.), that the executor was bound to give the account.

LR 13 Eq

14 Eq 29,

THIS was an appeal by the Plaintiffs from an order of Vice-Chancellor *Malins*, overruling exceptions to the answer of the Defendant *Dunn*.

The case made by the bill was to the following effect:—The testator, *Francis Huggins*, bequeathed his residuary personal estate, including specifically the goodwill of his business as an innkeeper, to his executors *Taylor* and *Fearn*, upon the trusts thereinafter declared; and directed that his wife should have the option of carrying on his business during her widowhood, and that his trustees should permit her, while carrying it on, to have the entire use, disposal, and management of all the capital, credits, stock, and effects which should be due, owing, or belonging to him in the business, and of all other his personal estate. The profits were to belong to the wife for the support of herself and such of the testator's children as should be under twenty-one, and not otherwise sufficiently provided for. After her death or marriage, or giving up the business, the trustees were empowered to carry it on, and if they thought fit not to do so they were to convert the estate and invest it upon trust as therein mentioned.

The testator afterwards, by a codicil, substituted the Defendant *Dunn* for *Taylor* as executor and trustee. He died in 1862, and the will was proved by *Dunn* alone. The bill alleged (par. 8), that for the purpose of carrying on the business, the widow pos-

Upon the required accounts being furnished
the suit was abandoned, & never brought to
a hearing See L R 15 Eq 137 n. (1)

sessed herself, with the privity and consent of *Dunn*, of all the testator's personal estate not specifically bequeathed, except so much as was requisite for payment of the testator's funeral and testamentary expenses, which were duly paid by the executor; and that by means of the personal estate so possessed by the widow, she paid all the testator's debts and carried on his business.

The Plaintiffs, who were brewers, alleged that the widow, at the time of her death in 1867, was indebted to them for beer supplied to her for the purposes of the above business, and that she died intestate, and that no person had taken out administration to her estate. The bill was filed against *Dunn* and the three children of Mrs. *Huggins*, claiming a lien on the personal estate authorized by the testator to be used in the trade; and it prayed for an account of what was due to the Plaintiffs and other unsatisfied creditors upon the trust estate of the testator; that it might be declared that the Plaintiffs and such other creditors had a lien upon the personal estate authorized to be used in the trade; that accounts might be taken of such personal estate, and that, if necessary, an account might be taken of the testator's debts and funeral expenses; and that provision might be made, out of the estate authorized to be employed in the trade, for payment of the Plaintiffs and the other unsatisfied creditors on the trust estate.

The interrogatory founded on par. 8 asked whether the widow did not, "with the privity and consent" of *Dunn*, possess herself of all, or some and what part, of the testator's estate not specifically bequeathed, &c., &c., and whether she did not "thereby or how otherwise, or in fact, pay all, or some and which, of the testator's debts, and whether or not carry on the testator's business." *Dunn*, in answer to this, admitted that the widow did, "without objection on my part," possess herself of all the personal estate not specifically bequeathed, and said he believed that the funeral and testamentary expenses were paid by her, "together with certain debts owing by the testator," out of the profits of the business. This formed the subject of the first exception.

The 14th interrogatory called for an account of the testator's personal estate and of the personal estate employed in the business. *Dunn* answered as follows: "I submit to the judgment of this Honourable Court, that I ought not to be required or compelled to set forth the account and give the discovery sought by the 14th interrogatory, until it has been decided whether or not the Plaintiffs are entitled to a lien upon the testator's estate and effects sought to be enforced by their said bill; for if it should be decided that the Plaintiffs are not entitled to such lien, the expense and trouble of setting forth such account and giving such discovery would be simply thrown away." *Dunn* stated his ignorance as to whether anything was due to the Plaintiffs for goods supplied or not. He admitted having got in after the death of the widow the personal estate employed in the business, and that he had in hand so much of it as he had not employed in payment of the testator's debts; but he did not state the amount. The refusal to render accounts was the subject of the second exception.

Vice-Chancellor *Malins* having overruled the exceptions—the first on the ground that the interrogatory had been sufficiently answered, and the second on the ground suggested in the answer—the Plaintiffs appealed.

Mr. *Glasse*, Q.C. (Mr. *Chapman Barber* with him), for the Plaintiffs, having opened the facts of the case, was stopped by the Court.

Mr. *Amphlett*, Q.C., and Mr. *Fischer*, for *Dunn*, in support of the order:—

The tendency of the later cases has been to excuse a Defendant from discovering what is not wanted to establish the Plaintiff's title at the hearing, if there is a *bonâ fide* question whether the decision at the hearing will not shew him to have no title: *Delarue* v. *Dickinson* (1); *Swabey* v. *Sutton* (2). *Clegg* v. *Edmonson* (3) was appealed from, and the Lords Justices did not order the discovery (4). Here we admit assets in hand, and the Plaintiffs want no more to get a decree if they are right in point of law: *Lockett* v. *Lockett* (5) and *Moore* v. *Craven* (before the Lord Chancellor and Lord Justice *Giffard*, January 26th, 1870), support our contention. If it should be decided at the hearing that there is no lien, the bill must be dismissed, and the expense of giving accounts of the testator's estate will have been thrown away.

(1) 3 K. & J. 388.

(2) 1 H. & M. 514. 9 Jur. N.S. 1321.

(3) 22 Beav. 125. 2 Jur. N.S. 824

(4) 8 D. M. & G. 798. 3 Jur. N.S. 299

(5) Law Rep. 4 Ch. 336.

L. C.
and L. J. G.
1870
THOMPSON
v.
DUNN.

15 [illegible]

11 Eq 33.

LORD HATHERLEY, L.C.:—

In my opinion it is impossible to support the order under appeal. There is no case in which the Court has ever applied the doctrine of *Adams* v. *Fisher* (1), so as to allow an executor by answer to refuse to set out an account of his receipts and payments. I do not mean to say that there might not be a case where the Court would allow him to do so if the asking for the accounts was vexatious. But, looking at the position of an executor, the Court has always thought it desirable that he should, by his answer, make a full discovery of the assets, so that the Plaintiff may be in a position to move to have the balance brought into Court. The case of a partnership stands on a different footing, for there no use can be made of the account before the hearing. So in the case of a patentee's suit, where the Defendant denies infringement, an account of profits is of no use before the hearing; and in *Moore* v. *Craven*, a discovery of the names of the purchasers of the machines would not be of any use for the purposes of the suit. The Court has often compelled executors to answer even where the discovery sought was vexatiously minute. I cannot say that in this case the Plaintiff has no chance of obtaining a decree; and that being so, the only questions are, whether the interrogatories are improper, and if not, whether they have been sufficiently answered? It is impossible to say that the interrogatory as to debts was improper, and it has not been answered at all. The interrogatory as to the assets is very stringent, and may seem to require the Defendant to set out an account of needless particularity; but these things must be looked at in a reasonable way, and it is well known that the Court does not even sanction an executor's setting out a list of assets with the minuteness of an auctioneer's catalogue. We should be doing mischief if for the first time we were to hold an executor justified in refusing by answer to set out any accounts.

SIR G. M. GIFFARD, L.J.:—

The Court, while it takes care that no oppressive use is made of its forms of procedure, must take care that parties are not allowed to refuse discovery which they ought to make. This is not a

(1) 3 My. & Cr. 526.

L. C.
and L. J. G.
1870
THOMPSON
v.
DUNN.

partnership case, but an executorship case, and the exceptions must be allowed with costs. The expense occasioned by the Defendants refusing to give discovery has been far greater than the expense of putting in a proper answer in the first instance.

Solicitors: Messrs. *Dobinson & Geare;* Messrs. *Henderson & Redhead.*

ALLEN *v.* BONNETT.

L. C.
and L. J. G.
1870
June 2, 8.

Act of Bankruptcy—Assignment—Fraudulent Preference—Lapse of Twelve Months.

14 Eq 592
7 Ch 542
— 641-2
BCLD 317
321-4

Seventeen months before his bankruptcy, a trader assigned by deed all his estate and effects by way of security for the repayment of a sum then due, and of a further advance of a moderate amount:—

Held that, under the circumstances, the deed was not void under the 13 Eliz. c. 5, or as an act of bankruptcy:

Semble also, that even if there had not been a further advance to the bankrupt, the lapse of twelve months before the bankruptcy prevented the deed from being invalidated as an act of bankruptcy.

Decree of *Malins*, V.C., affirmed.

ELIAS BONNETT was a brickmaker at *Sittingbourne*, and appeared to have had a large number of cottages and houses in the neighbourhood, and to have been in a large way of business. The Defendant, *Charles Bonnett*, was an uncle of *Elias Bonnett*, and kept a public-house in *Essex*, dealing also in hay and straw to a small amount.

By an indenture dated the 22nd of February, 1865, and made between *Elias Bonnett* of the one part, and *Charles Bonnett* of the other part, after reciting that *Elias Bonnett* was indebted to *Charles Bonnett* in the sum of £450, and had occasion for a further advance, it was witnessed that in consideration of £300 paid by *Charles Bonnett* to *Elias Bonnett, Elias Bonnett* conveyed to *Charles Bonnett* and his heirs his freehold cottages and other property near *Sittingbourne*, and all the leasehold messuages of *Elias Bonnett*, and all the stock-in-trade and furniture, and chattels, personal estates, and effects of *Elias Bonnett*, and all debts due to *Elias Bonnett*, to hold the same to *Charles Bonnett*, subject to redemption on payment to *Charles Bonnett* of £750 and interest.

L. C. and L. J. G.
1870
ALLEN v. BONNETT.

On the 2nd of July, 1866, *Elias Bonnett* was adjudicated a bankrupt, and on the 5th of December, 1867, his assignees filed the bill in this suit against *Charles Bonnett*, praying to have the indenture of the 22nd of February, 1865, declared void, and to have it cancelled.

The circumstances attending the advance of the money were suspicious; the Plaintiffs attempted to shew that no money had really been advanced, and evidence as to the *bona fides* of the mortgage was entered into on both sides.

Vice-Chancellor *Malins* dismissed the bill.

Mr. *Glasse*, Q.C., Mr. *Higgins*, and Mr. *Chute*, for the Appellants:—

We contend, first, that this was not a *bonâ fide* transaction; secondly, that even if it was so, it was a conveyance with intent to defeat and delay creditors within the meaning of the Act of 13 Eliz. c. 5; and, thirdly, that it was an act of bankruptcy, and as such void. It is true that the bankruptcy was more than twelve months afterwards, but that is not a fixed period, and such a deed will be voidable by assignees in a bankruptcy at any time afterwards. Section 67 of 12 & 13 Vict. c. 106, *Ex parte Taylor* (1), and *Ex parte Sparrow* (2), are clear on that point; and *Hassells* v. *Simpson* (3) and *Ex parte Foxley* (4) are also authorities. Even if the bankrupt does obtain an advance at the time, such a deed may be void: *Graham* v. *Chapman* (5); *Bittleston* v. *Cooke* (6). The advance, if actually made, was not a substantial advance enough to support such a deed.

Mr. *De Gex*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the Defendant:—

There must be actual fraud in order to cause a mortgage to be set aside as an act of bankruptcy after twelve months: 12 & 13 Vict. c. 106, s. 88; *Shrubsole* v. *Sussams* (7). Here there was an actual advance; and if a man could not mortgage all his property in

(1) 5 D. M. & G. 392.
(2) 2 Ibid. 907.
(3) 1 Doug. 89 n.
(4) Law Rep. 3 Ch. 515.
(5) 12 C. B. 85.
(6) 6 E. & B. 296. 2 Jur. N.S. 75
(7) 16 C. B. (N.S.) 452.

L. C.
and L. J. G.
1870
ALLEN
v.
BONNETT.

order to obtain an advance, the consequences would be very alarming, and many mortgages which have always been held quite valid would be void. It is clearly the rule at law that such a transaction is valid, *Mercer* v. *Peterson* (1): *Ex parte Sparrow* (2), and *Ex parte Taylor* (3), can hardly be called decisions. There is no Act which says that a conveyance of the whole of a man's property is void. Then where is the fraud upon the creditors in this case, even if no further advance was made? The debtor being indebted to several secures one. It is clear that he did not then contemplate bankruptcy, and was in no immediate difficulties: *Belcher* v. *Prittie* (4); *Bills* v. *Smith* (5); *Hutton* v. *Cruttwell* (6). It is on the Plaintiff to shew that such was the case, but he cannot. *Graham* v. *Chapman* (7) is not law at the present day.

[They also cited *Pennell* v. *Reynolds* (8); *In re Colemere* (9); *Alton* v. *Harrison* (10), and *Woodhouse* v. *Murray* (11).]

Mr. *Glasse*, in reply:—

Such a transaction is against the policy of the law, and it does not signify that twelve months have elapsed; the assignment is always void: *Marks* v. *Feldman* (12); *Bevan* v. *Nunn* (13).

LORD HATHERLEY, L.C., after stating the facts of the case, continued:—

We have to decide whether the execution of this deed was fraudulent, and whether it is to be taken as an act of bankruptcy in itself, and so to be fraudulent as against the assignees of the bankrupt.

These cases have now undergone very great consideration, and the authorities upon the subject are extremely numerous. But I think that, in the absence of distinct proof of positive fraud, there are two badges or *indicia* of fraud which have induced the

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(1) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.
(2) 2 D. M. & G. 907.
(3) 5 Ibid. 392.
(4) 10 Bing. 408.
(5) 6 B. & S. 314. 11 Jur. N.S. 155.
(6) 1 E. & B. 15. 17 Jur. 392.
(7) 12 C. B. 85.
(8) 11 C. B. (N.S.) 709.
(9) Law Rep. 1 Ch. 128. 12 Jur. N.S. 38
(10) Ibid. 4 Ch. 622.
(11) Ibid. 2 Q. B. 634.
(12) Ibid. 5 Q. B. 275.
(13) 9 Bing. 107.

Court on all occasions to say that deeds of this character shall not be sustained against the creditors under a bankruptcy, when such *indicia* are found. One is where the whole of the person's property who afterwards becomes a bankrupt has been assigned for an antecedent debt, and no further advance has been made, the view taken being this: that the creditors of the trader obtain no advantage whatever from the transaction, and that it is simply a subtraction of the property in favour of one creditor, without any benefit whatever being conferred upon the bulk of the creditors. It has also been held an *indicium* of fraud where an assignment is made by a trader just upon the verge of bankruptcy of such frame and form as to indicate clearly and plainly upon the face of the deed and the face of the transaction, without any further proof of fraud or arrangement between the parties, that the purpose was fraudulent: as in the case of *Graham* v. *Chapman* (1). Those two classes of cases being set aside, it has been held that if there be (as Mr. Justice *Willes* puts it) either a substantial exception from the whole of the bankrupt's property, or a substantial advance made at the time, in addition to any antecedent debt, then the deed will be supported, of course always in the absence of any special circumstances affording evidence of a fraudulent concoction between the parties.

Upon the first opening of this case, I was very much inclined to have my suspicions, and it is hardly possible not to have them from the very peculiar and singular circumstances of this case; but, strange as the account given may be, I think the fair conclusion from all the evidence is, that the story of the Defendant is true, and that there was a substantial advance made which would justify the execution of the deed. [His Lordship then commented on the evidence, and came to the conclusion that the transaction was *bonâ fide*, and that the advance had so far this effect, that the man did continue in his trade, not being at that time apparently in difficulties].

As to the lapse of time, the Act 12 & 13 Vict. c. 106, s. 88, provides, no doubt, that an assignment of this description cannot be relied upon as an act of bankruptcy after the expiration of twelve months; but the bankruptcy having occurred, the assignees have

(1) 12 C. B. 85.

a right to have the matter investigated, to see whether it be fraudulent or not, and whether it be an act of bankruptcy or not; and I can conceive that cases might arise in which there might be a difference between an act to delay creditors under the Statute of *Elizabeth* by a non-trader, and an act of bankruptcy by a person engaged in trade; but what we have to look to is whether or not, within the classes of authorities which I have referred to, the Defendant has established a *bonâ fide* substantial advance; and I think, upon the whole of the evidence, that he must be said to have done so. Therefore, the Vice-Chancellor's decision was right, and the appeal must be dismissed with costs.

SIR G. M. GIFFARD, L.J.:—

12 ChD 32

The bill in this suit is filed by the assignees of a bankrupt to set aside a deed executed by him seventeen months previously to his bankruptcy. If the deed had been without consideration, or the consideration had been in substance fictitious, or if the deed was not intended to operate according to its tenor and effect, or was agreed to be made use of for the benefit of the bankrupt, or was a fraudulent preference, or was void as being obnoxious to the provisions of the Statute of *Elizabeth*, the lapse of the seventeen months would be of no importance. Apart, however, from the deed being an act of bankruptcy, and thus within the case of *Graham* v. *Chapman* (1), and the class of cases of which that is one, the utmost that could be fairly urged in argument against it was, that there is no proof, or that there is insufficient proof, of the consideration. [His Lordship then commented on the evidence, and stated his conclusion to be that *Charles Bonnett* had made advances, if not to the full amount claimed, at all events to the amount altogether of £500 or £600 at least].

This being so, if there had been no bankruptcy, the deed would have been valid, according to *Alton* v. *Harrison* (2), and the well-known cases on which that decision was founded. The question to be determined therefore is, whether, notwithstanding the lapse of more than twelve months between the execution of the deed and the bankruptcy, the deed is impeachable? If a trader makes

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(1) 12 C. B. 85.

(2) Law Rep. 4 Ch. 622.

L. C.
and L. J. G.
1870
ALLEN
v.
BONNETT.

over the whole of his property as security for a bygone debt, not reserving a substantial part of it, or if he reserves nothing substantial, not receiving a substantial advance as part of the consideration, such a transaction, though *bonâ fide* in point of intention on both sides, is an act of bankruptcy. What may or may not be a substantial advance must depend on the circumstances of each particular case. Whether the advance in this case was sufficient to make the deed an exception to the rule, I do not consider it necessary to determine; for whether it did or did not do so, the result in my opinion is the same. According to *Shrubsole* v. *Sussams* (1), and *Mercer* v. *Peterson* (2), not on this point dissented from in the Exchequer Chamber (3), the lapse of twelve months is fatal. The contrary was not decided in *Ex parte Taylor* (4), or *Ex parte Sparrow* (5). This is the legitimate consequence of the 88th section of the Act of 1849, which enacts that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issue of any fiat. It appears to me to follow from this section, that where there is a deed which cannot be set aside under the Statute of *Elizabeth*, or generally as fraudulent—including in the term a fraudulent preference—but solely and only as being an act of bankruptcy, the lapse of twelve months before any fiat issues validates that which would otherwise be impeachable; and that if a given transaction of this description cannot be treated as a ground for adjudication, it cannot be treated as having the consequences of an act of bankruptcy in any sense or for any purpose.

12 Ch D 324

For these reasons I am of opinion that the appeal should be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Nickinson, Prall, & Nickinson*, agents for Messrs. *Prall & Son, Rochester*.

Solicitors for the Defendant: Messrs. *Duffield & Bruty*, agents for Mr. *W. Duffield, Chelmsford*.

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(1) 16 C. B. (N.S.) 452.
(2) Law Rep. 2 Ex. 304.
(3) Law Rep. 3 Ex. 104.
(4) 5 D. M. & G. 392.
(5) 2 D. M. & G. 907.

ATTORNEY-GENERAL *v.* LEEDS CORPORATION.

L. C.
and L. J. G.
1870
June 9.

11 Eq 120
[illegible] 370
18 Eq 176
20 Eq 503
628
7 Ch D 21
11 Ch D 16
6 App Cas 1
20 Ch D 66

Nuisance—Pollution—Special Act—Injunction—Delay.

By the *Leeds Improvement Amendment Act*, 1848, it was provided that the clauses of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34), as to making and maintaining public sewers and the drainage of houses, should be incorporated with and form part of the Act "except so far as they or any of them are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act;" and by sect. 6 of the Act the Corporation of *Leeds* were authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town and to convey the same into the river *Aire*:—

Held, that the power to drain into the river was controlled by sect. 24 of the *Towns Improvement Clauses Act*, and also by sect. 107, though that clause was not expressly incorporated in the local Act; and that the corporation were not authorized by sect. 6 of the local Act to create a nuisance by draining into the river:

Held, that though the river *Aire* was polluted before it received the drainage of *Leeds*, the landowners on the banks were entitled to restrain the further pollution:

Held, that though the sewer had been completed, and in operation sixteen years before proceedings were taken, the Court would interfere at the suit of the landowners.

Decree of *James*, V.C., affirmed.

THIS was an information at the relation of two landowners on the banks of the river *Aire*, below *Leeds*, for the purpose of restraining the Defendants, the Corporation of *Leeds*, from polluting the river *Aire* by pouring into it the sewage of their town in an unpurified and undeodorised state.

By the first section of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34), it was enacted that the Act should extend only to such towns or districts as should be comprised in any Act of Parliament thereafter to be passed, which should declare that that Act should be incorporated therewith: and that all the clauses of that Act, save so far as they should be expressly varied or excepted by any such Act, should apply to the town or district which should be comprised in such Act, and should, with the clauses of every other Act, which should be incorporated therewith, form part of such Act, and be construed therewith as forming one Act.

By sect. 5 it was provided that, for the purpose of incorporating part only of that Act with any Act thereafter to be passed, it should be enough to describe the clauses of that Act with respect to any matter in the words introductory to the enactment with respect to such matter. Accordingly, the Act was divided into heads or divisions relating to different subjects. Sects. 19 to 21 related to lands; sects. 22 to 34, to sewers; 35 to 46, to house drains; sects. 99 to 107, to the prevention of nuisances; and so on. Sect. 24, which came under the division relating to sewers, was as follows:—"The commissioners shall from time to time, subject to the restrictions herein contained as to the notice to be given and the plans and estimates to be prepared, cause to be made under the streets such main and other sewers as shall be necessary for the effectual draining of the town or district within the limits of the special Act . . . . and they may also cause such sewers to communicate with and empty themselves into the sea or any public river, or they may cause the refuse from such sewers to be conveyed by a proper channel to the most convenient site for its collection and sale for agriculture or other purposes, as may be deemed most expedient, but so that the same shall in no case become a nuisance."

Sect. 25 empowered the commissioners as they saw fit to enlarge, alter, arch over, and otherwise improve the sewers vested in them; and if any such sewers at any time appeared to have become useless, to demolish and discontinue such sewer, provided that it be so done as not to create a nuisance.

Sect. 107, under the division relating to the prevention of nuisances, was as follows:—"Nothing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is or but for this Act would be deemed to be a nuisance at common law, nor to exempt any person guilty of nuisance at common law from prosecution or action in respect thereof, according to the forms of proceeding at common law, nor from the consequences upon being convicted thereof."

In 1842 an Act was passed for better lighting, cleansing, sewering, and improving the borough of *Leeds* (the *Leeds Improvement Act*, 1842), which contained powers to construct common sewers and to bring the private drains into communication with them; and in 1848 a further Act was obtained by the corporation, called the *Leeds Improvement Amendment Act*, 1848. By this Act it was provided (sect. 3) that such of the clauses of the *Towns Improvement Clauses Act*, 1847, as related "to the making and maintaining the public sewers and to the drainage of houses, and to entry by the commissioners or their officers in the execution of that or the special Act, and to insuring the execution of the works by that or the special Act required to be done by the owners or occupiers of houses or lands, and as to the rates directed by that Act to be made for sewers, drains, and private improvements, and to the manner of making rates authorized by that or the special Act, and to the appeal to be made against any rate, and to the recovery of rates, and also to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this Act; and such clauses, except so far as they or any of them are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act, shall form part thereof."

By sect. 6 it was enacted, "that the several townships of *Leeds, Hunslet*, and *Holbeck*, in the borough of *Leeds*, shall be one drainage district; and it shall be lawful for the council to construct one main trunk and other sewer or sewers sufficiently capacious to receive the foul and drainage water and filth of all the said three townships, and to convey the same into the river *Aire*." And by sect. 7, "that it shall be lawful for the council to unite the several other townships within the borough, or so much and such parts thereof respectively as the council shall think fit, into one or more drainage district or districts, and to construct one or more main trunk or other sewer or sewers for the purpose of receiving the foul and drainage water and filth of each such district."

Under the powers of the *Leeds Improvement Amendment Act*, the corporation, in 1850, began to make sewers for the townships of *Leeds, Hunslet*, and *Holbeck*, with an outfall into the river *Aire*. This outfall was opened in 1853, and since then communication had from time to time been made with the main trunk sewer, and so into the outfall, the outlay upon the work having been £207,355. The borough of *Leeds* has a population of about 250,000, and the population of the townships of *Leeds, Hunslet*, and *Holbeck* amounted to 180,000 and upwards. In 1866 the corporation formed a second drainage district, known as *St. John's*, containing 2400 houses, with a population of about 12,000, and the drainage from the houses in this new district was being conveyed into the *Aire;* and the corporation had recently formed a third drainage district, including several very populous townships, and were proceeding to construct sewers and convey the sewage into the river.

The landowners on the banks of the *Aire*, below *Leeds*, did not appear to have objected for some years; but in August, 1869, they held a meeting, and passed resolutions to the effect that the pollution of the river by the discharge of the sewerage had recently increased so as to affect the health of the inhabitants, and that the water had become unfit for cattle and destructive to fish.

Shortly afterwards, this information was filed at the relation of two of the landowners.

It was admitted by the Defendants that the *Aire*, below *Leeds*, was foul and polluted; but they alleged, in opposition to the information, First, that the *Aire* was a polluted stream, from the drainage of a large district including several manufacturing towns, before it reached *Leeds*, and that the nuisance was only partially due to the drainage operations of the corporation, and of this evidence was produced; secondly, that if the nuisance arose from the drainage works of the corporation, they were acting under the powers given by the *Leeds Improvement Amendment Act*, 1848, and had not exceeded those powers; thirdly, that a large sum of money had been spent on these sewers many years ago, without objection by the present informants; and, fourthly, that as no alteration could be made in the present system of drainage without the risk of serious injury to the health of the inhabitants of *Leeds*, the Court, on the balance of convenience and inconvenience, ought not to interfere.

The Vice-Chancellor *James*, upon motion for a decree, granted an injunction restraining the Defendants from the second day, after the close of the Parliamentary Session of 1871, from causing or permitting the sewage of *Leeds*, or any part of it, to pass through their main sewer into the river *Aire*, unless sufficiently purified and deodorised so as not to be a nuisance; also restraining the Defendants from making any new sewer, and from allowing any such sewer to communicate with their main sewers (1).

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(1) March 2, 1870.

SIR W. M. JAMES, V.C. :—

I am of opinion that the informants have made out their case sufficiently to obtain the protection of the Court, both on evidence and on authority. It does not appear to be in controversy that a nuisance of a most offensive description and injurious to health has been produced by the drainage operations of the Defendants, who seem to have been misled, by the same delusion which has misled many other corporations, in supposing that their sewage could be turned into a river without making that river in truth an open sewer. The existence and extent of the nuisance being established, the question arises, whether the *Leeds* corporation have by their Act of Parliament obtained a *privilegium*, which has not, as far as I am aware, been given to any other body in the kingdom, of effecting the drainage of their town without regard to any extent of nuisance whatever committed by them upon any persons residing outside the town. It is contended that they did, I suppose, catch the Legislature napping, and obtain from it the power contained in sect. 6 of their private Act of Parliament, which, of course, must be considered really as drawn by the corporation, and must therefore be construed, not without regard to the circumstance, if there be any ambiguity in it, that they went to Parliament and obtained this power. [His Honour read sect. 6.]

Having previously got powers to drain the town and neighbourhood, which did not enable them to commit any nuisance, they suggested to the Legislature that it would be convenient to amend those powers, and obtain further and larger powers. In the interval the general Act, called the *Towns Improvement Clauses Act*, providing generally for this kind of work, throughout the kingdom at large, was passed. In that Act it was carefully provided by the Legislature that no powers given or intended to be given with reference to the sewage of towns, should be acted upon so as to become or create a nuisance. That was carefully provided over and over again in this general Act, which marked the intention and spirit of the Legislature in that respect. The *Leeds* corporation then obtained their private Act of Parliament, in which were incorporated all the clauses of the *Towns Improvement Clauses Act*, 1847, which relate to the making or maintaining the public sewers and the drainage of houses. The commissioners, or the body, whoever they may be, to whom the powers are confided, may take the sewage to the sea or to a river but so as in no case to become a nuisance. I apprehend that that clause is part of the *Leeds Improvement Act*, 1848, and, further, that sect. 107 of the general Act is also incorporated, so far as it relates to these clauses. The special Act of Parliament enables the special body to use all the powers contained in that part of the Act which is distinguished by the words "With respect to making and maintaining the public sewers," but I apprehend it was never intended they were to have those clauses free from and unqualified by the general clauses at the end, which extend to the whole. They were to have the power given by this clause, but subject to the general provisions which are contained in sect. 107. Therefore, we find, that the private Act of the *Leeds* corporation does repeat the

L. C.
and L. J. G.
1870

Attorney-General
v.
Leeds
Corporation.

The Defendants appealed.

Mr. *Jessel*, Q.C., Mr. *Fry*, Q.C., and Mr. *Graham Hastings*, for the Appellants:—

We say that our Act of 1848 gives us, in the clearest terms, a right to drain into the river. Whether it was good policy or not

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provisions of the general Act which are intended to prevent the creation of a nuisance. But it has been contended that, if that be so, those clauses are only introduced into the *Leeds* Act so far as they are consistent with it, and that it is not consistent with it to introduce them into sect. 6, as that clause will then be rendered nugatory. I apprehend that sect. 6 is not made nugatory at all. One sees exactly the real effect and meaning of the clause when one sees in what way the powers, given by the general Act, were to be exercised. They were to be exercised under the control of an inspector; the districts were to be sanctioned by the inspector; notices were to be given, plans and estimates were to be provided, and a variety of things done without which not a single work could be done. In respect of these particular works of the Corporation of *Leeds*, it was thought not necessary to subject them to an inspector, or to the necessity of giving notices or preparing plans or estimates. The Legislature sanctioned the plan for converting the whole township into one drainage district, and conveying the sewage of that district by one or more main trunks or sewers into the river *Aire*, and, as between the corporation and the rate-payers, authorized these works to be done without requiring the authority of the inspector, and without the necessity of any estimates or notices as required by the general Act. The corporation are therefore relieved from that, but it seems to me that it was never intended that they should be allowed to do this, free from any complaint of nuisance, whatever nuisance might be thereby created. If it was intended in a local Act of this kind to obtain relief from a general law to the extent of being uncontrolled by this Court, and unpunished by a Court of Common Law, they ought to have obtained it in plain and specific words, and if there is any construction to be put on a local Act which would prevent such a monstrous injustice, I should be bound on the evidence to put it. I do not think it requires any sort of straining of the words of the Act to say that these special clauses were clauses meant to relieve the corporation from these special restrictions with regard to works, notices, and so on. It would still leave them, subject to the general provisions which are applicable to every corporation in the kingdom, under similar circumstances, viz., that they shall conduct their works so as not to create a nuisance. I am of opinion that the corporation are conducting their works so as to create a nuisance.

It is said, however, that I am dealing not with the case of a riparian proprietor, but with the case of an information by the Attorney-General, and that the Attorney-General ought to regard the health of the large population of the town of *Leeds*, rather than the health of the comparatively few inhabitants along this valley who are said to be affected by what has been done. That is a matter for the consideration on the part of the Legislature is not the question; if it was wrong, let the persons aggrieved go to Parliament and get the Act repealed; but as long as it exists this Court is bound by it, and ought not to be astute in trying to evade a clear enactment, because that enactment appears to inflict a wrong. Then, as to the *Towns Improvement Clauses Act*: that Act enacts nothing, but is merely a collection of clauses, and no part of that Act applies where it is inconsistent with the special Act; no clause, therefore, can be incorporated with the special Act which is inconsistent with this clear enactment of the special Act. The corporation do not want the general Act at all, except for the rating clauses, as the special Act gives them full power to make their sewers. As to sect. 107 of the general Act, on which the Vice-Chancellor relied, that does not apply at all, for the division in which that section is placed has not been incorporated with our Act. Moreover, the general Act is separated into divisions, and the clauses in each division apply only to the matters in that division, and the nuisances to which that division relates are not those created by the corporation or

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of the Attorney-General in granting his fiat rather than for the Court. The Attorney-General always exercises his discretion in these matters, and if he thinks it is not right he does not file an information for the redress of a public wrong. But the Court cannot say that the small population (there is no evidence before me of what it is) along the valley of the *Aire*, below *Leeds*, has not a right, through the medium of the Attorney-General, if he chooses to issue his fiat, to file an information to prevent a nuisance being inflicted upon them by the larger and more populous district of *Leeds*. I am not much impressed, as several of my predecessors were not, by the danger to the health of the inhabitants of the town if I interfere with their sewage. I believe they will find means of removing the sewage without the danger to health which has been suggested; but, at all events, I think the people below the town have a right to say that a nuisance must not be created for them. I am of opinion, therefore, that these informants are entitled to the interposition of the Court. With regard to sect. 7, I have no doubt whatever about it. There is no pretence, as it seems to me, for saying that they can turn the sewage into the river *Aire*, and it is no answer to say that they are sending in so much already that a small quantity more will not be important. There will be an immediate injunction to restrain any further communication with any of the existing outfalls into the river *Aire*, and an injunction from a certain day, as in the *Halifax Case*, against causing or permitting the sewage of the borough to flow or pass through their main sewer or any other outfall into the river *Aire* unless and until the same should be sufficiently purified and deodorised so as not to be or create a nuisance, or become injurious to the public health.

L. C. and L. J. G.
1870
ATTORNEY-GENERAL v. LEEDS CORPORATION.

commissioners. We have by the special Act express power to create a nuisance, for pouring filth into a river must be a nuisance. But even if the Plaintiffs could have restrained us originally, they have lain by for sixteen or seventeen years, and have allowed the corporation to spend these enormous sums of money, and cannot now come into a Court of Equity to complain. It must have been clear from the beginning that draining a town like *Leeds* into a small river must turn that river into a sewer, and we say that it has been so for many years, and the increase of the town makes no practical difference, Moreover, the river, before it reaches *Leeds,* is utterly polluted, and even if the draining of *Leeds* is cut off it will be a filthy stream.

[They cited *Wood* v. *Sutcliffe* (1); *Attorney-General* v. *Proprietors of Bradford Canal* (2); *Hammersmith and City Railway Company* v. *Brand* (3); *Attorney-General* v. *Colney Hatch Lunatic Asylum* (4).]

Sir *Roundell Palmer,* Q.C., Mr. *Kay,* Q.C., and Mr. *C. Hall,* for the informants, were only called upon as to the delay.

LORD HATHERLEY, L.C. :—

The argument which has been addressed to us was this: Mr. *Jessel* contends that the 107th section is not imported into the local Act, because that particular class of regulations in which the 107th section is included is not incorporated in that Act, and, therefore, independently of any question arising upon the 6th section of the local Act, the corporation could exercise such powers as they had incorporated without regard to the 107th section, and those who were acting under the local Act would not be fettered by the provisions of the general Act. However, we arrested him in the course of his argument, which appeared to be a manifest fallacy, by simply saying that, if you take the powers of the general Act, and profess to act under the powers of the general Act, which but for that license you could not do without being indicted for a nuisance, you have taken those clauses which fetter the exercise of every power contained in the general Act. Now the 107th section says, "nothing in this Act contained;" and it applies to the whole Act. It is not, "nothing in this division or section," but it is "nothing in this Act contained" shall authorize a nuisance. Therefore, inasmuch as the general Act gives a general license to do certain works and things which may occasion a nuisance, it takes care, at the same time, to say that if in the exercise of these powers you do any nuisance whatever, you shall be punishable for so doing. You cannot take a number of those powers, as a sort of bundle, out of the general Act, and say that, when once taken out of the general Act, they are free from all fetters imposed upon them by that Act. That appears to me to be a manifest fallacy, and Mr. *Jessel,* I think, rather retreated from that position. But when he retreated from the position he took up another, which requires a little more explanation. He said that at all events the fettering clause only applies, and is attached to, such clauses as are imported into the local Act, and if the Defendants could shew an original authority and power in their local Act not derived from the special Act, and therefore not subject to that fetter so imposed upon the exercise of the power conferred by the general Act and imported into the local Act, then, under the original powers of the local Act, the Defendants might call in aid the decision of *Rex* v. *Pease* (1), and say that there is something in the local Act which authorizes them to do a given thing, without any provision at all that they are to be liable for any consequence in so doing; and, therefore, those cannot complain who may be affected by that Act, inasmuch as the Legislature has given the power, and has not imposed any fetter. Accordingly, he points to the 6th section of the local Act. But the local Act has expressly incorporated the provisions with reference, in the first place, to the making and maintaining of public sewers, running from the 22nd clause of the general Act to the 34th inclusive, and including, therefore, the 24th. The construction of the last clause in the 24th section has been now settled, after some contest, in which it was attempted to apply that proviso, "that the same shall in no case become a nuisance," only to the last thing named, namely, the collection and sale for agricultural or other purposes; but it has now been held (and, to my mind, it is certainly quite clear) that it applies also to the previous

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(1) 2 Sim. (N.S.) 163; 16 Jur. 75.
(2) Law Rep. 2 Eq. 71.
(3) Law Rep. 4 H. L. 171.
(4) Ibid. 4 Ch. 146.

(1) 4 B. & Ad. 30.

part, namely, the carrying the sewage into the sea or any public river.

Now, if it rested there alone, what would be the effect of the combined result of the general Act and this Act? It is this—and I think the Vice-Chancellor's view was quite correct on the subject—there are certain provisions contained in the general Act as to how plans and designs shall be formed, how contracts shall be entered into, and the like; that part is taken up specially by the local Act, and special provisions are introduced approving of certain plans which have been made, and therefore exempting the corporation from any difficulties which might arise, or any minute observances that might be required under the general Act; and that, I think, is really the function and intention of the 4th, 5th, and 6th clauses. By the 24th section of the general Act the corporation is authorized to convey the sewage into public rivers, but the Legislature does not say that in carrying it into the river *Aire* they were to be under different obligations or conditions from what they would be if they had simply been acting under the provisions of the general Act. What is more, the corporation had imported the very section (24) into their Act by special enactment; and, therefore, when working under the 6th clause they are working also subject to the clause which says, that when you convey anything into a public river, you must do it so as not to create a nuisance.

But the case really does not rest there. It is idle to say that by the 6th clause of the local Act there is a special power to discharge the sewage into the river *Aire* given free from all power and authority contained in the general Act, and without requiring the assistance of any clause contained in the general Act. The sewage cannot be conveyed into the river *Aire* under the operation of the 6th clause alone, and without exercising the powers mentioned in the general Act of acquiring people's property, and dealing with property, and making a rate for the purpose of doing this work. Although it is said that there is an earlier Act which authorized making a rate, still the corporation chose to incorporate into their Act all the powers contained in the general Act, to enable them to do the work, and thus the corporation comes again under the 107th section, because none of these powers were to be exercised so as to create a nuisance. It seems still more plain from sect. 86 of the general Act, which is incorporated in the local Act, and would bind the commissioners as soon as by clause 6 they had made a sewer which would conduct the sewage to the river *Aire.* Upon the building of every new house, or every new collection of houses, which may be built in the town, they are to take care that there shall be ultimately a drain made from those new houses at once, or as speedily as can be, into the new sewer, and subject to what is clearly and distinctly imported into the Act. Then the consequence follows, that they must drain into the new sewer in such a way as not to create a nuisance. In that state of things it is quite impossible that this work can be carried on irrespective of the 24th and 107th sections of the general Act.

But, then, the Defendants say that they only import these clauses so far as they are not inconsistent with this Act, and that to drain into the river *Aire* without creating a nuisance would be inconsistent with what is contained in this Act, because it is impossible to drain into the river *Aire* without creating a nuisance. Yet the Legislature may have thought that the thing could be done (and, for aught I know, it is not impossible it can be done) without creating a nuisance. The Defendants say that, from the local position of this particular river, it is impossible for them so to do it; and, perhaps, the means now devised may not be adequate to enable them to do the work without creating a nuisance. But I do not think we can assume that Parliament, who had provided by the 24th section that they should drain into a river, or that they should be at liberty to do so without creating a nuisance, thought that under the particular circumstances of this particular case it would be impossible to drain into this river without creating a nuisance. I think it would be inconsistent with the power so given to hold that the parties are not to be restrained from creating a nuisance. According to the contrary construction of the Act, there may be a number of people who might have a serious injury inflicted on them, and might have the whole of their property destroyed, without there being any provision to compensate them. I do not think that is the rational or reasonable construction, and, looking at the 24th section, and a portion of the 107th section, and

L. C. and L. J. G.
1870
ATTORNEY-GENERAL v. LEEDS CORPORATION.

its operation, and the clauses contained in the general Act, which are incorporated in the local Act, I do not think that there is any other intention to be assumed than this—that they are to carry on the whole of the work which they are authorized to do by the local Act, subject to the provisions and regulations which, in effect, bind all those who take advantage of the powers of the general Act, in order to achieve the reasonable object they have in view, and without injury to persons who may be affected by the exercise of those powers.

The only point that really seemed to me to create any question in the cause was this, that all was done sixteen years ago; that a great deal of money was laid out in the construction of these works; and that the landowners and other persons injured might be affected by standing by and seeing an expenditure of money which they might know could only tend to one result, and was only intended for one purpose, which purpose must necessarily produce the result in question, and yet making no complaint. I think the true answer is that which had occurred to us before we called on Sir *Roundell Palmer*, namely, that when any person finds that the Legislature has authorized a work to be done (and, of course, the force of this is increased by the view we have taken, that the true construction of the Act is, that it is to be done without creating a nuisance), he is not to assume it will create a nuisance. On the contrary, the presumption would be that the Board would not do anything unlawful. It is lawful for them to make the sewers, it is lawful for them to conduct the sewage into the river *Aire*, but they are to do it in such a way as not to create a nuisance; and until it is ascertained that the construction of the work will result in a nuisance, I do not see how any person could have sued. If he had, I apprehend the answer would have been, "We have the power to do this by the Act, and you cannot restrain us from doing the act, unless you can allege some grievance on the subject, and you cannot sue in the form of *quia timet*, because the Legislature seems to have contemplated there was a probability of that being done which they had authorized to be done." I think, therefore, that is a complete answer to the question of delay, which it struck me at the time was really the serious question in the cause, because as to duration of time in any other sense than that I cannot hold, nor do I understand the Vice-Chancellor to have held that the simple fact of the evil becoming more or less unbearable can affect the element of your allowing expenditure to be incurred. But I do not think the mere fact of a Plaintiff bearing for a certain time an evil would alone prevent the Court from saying that the evil may not be arrested, and in this case there is certainly this fact, that the evil is a continually-increasing evil; and that being so, it seems to me high time that the parties who do mean to assert their rights should do so.

I think the argument deduced from the foul state of the water before it gets to *Leeds* is not deserving of any weight, for two reasons—first, and it is hardly disputed, the evil did become seriously aggravated when the new sewer was opened—that is to say, sixteen or seventeen years ago; and, secondly, the nuisance might terminate, and no one could say it was right that when one nuisance terminates there should be another brought into existence. It seems to me, therefore, upon the whole case, that the conclusion the Vice-Chancellor has come to is correct. The Defendants must either abate the evil—whatever difficulties may be imposed in their way—or they must go to the Legislature; and, no doubt, the Legislature will be ready to afford a remedy if they find the evil is such as is deserving of it.

SIR G. M. GIFFARD, L.J.:—

That the *Leeds* corporation in this case have created a nuisance has scarcely been disputed, and seeing that they daily pour into this river something like 15,000,000 gallons of sewage, more or less, the evil cannot be doubted. The first question therefore is, has the corporation a Parliamentary power to create a nuisance? It was argued that they have a Parliamentary power to create a nuisance—first, because the *Towns Improvement Clauses Act* has several divisions, and the 107th section is not among those divisions which are imported into the special Act of the corporation by the 3rd clause of the Act. We stated at once, as must be clear to every human being, that the 107th section is a general section, and that the 107th section says, in terms, that nothing contained in that Act shall authorize a nuisance; and, therefore, whatever powers may be imported into the *Leeds* special Act must necessarily be powers not authorizing the creation of a nuisance. Besides that, it was said that the 6th clause of the *Leeds* Act authorized the thing to be done without any restriction whatever. However, that is not so. You must take the whole of the Act of Parliament together. You have the 3rd clause, which imports a vast variety of powers from the *Towns Improvement Clauses Act*—among others, those of the 24th and 36th sections; and then the 6th clause is neither more nor less than a power to carry out, under the powers of the *Towns Improvement Clauses Act*, a particular system of drainage. That being so, the 107th section clearly applies to every power which the Corporation of *Leeds* have; and they have no Parliamentary power to create a nuisance. To that I may add that, in construing the Act, one must always consider that, if it had a different meaning, it would be against common sense.

The only other ground of defence is the ground of delay; but inasmuch as the Act of Parliament authorizes a particular thing to be done in such a way as not to create a nuisance, if a person, while those works were in progress, had filed a bill, the answer would at once have been—"We are not going to do anything to injure you, and therefore you cannot maintain your bill." Besides that, it is quite obvious that, if matters are left alone, there must be a continually-increasing nuisance, because, under the *Towns Improvement Clauses Act*, it is positively enacted that the commissioners shall see that every new house is drained into this particular river. On those grounds I think the delay is of no importance, and I am clearly of opinion that the Vice-Chancellor's order was perfectly correct, and that the appeal must be dismissed with costs.

Solicitors: Messrs. *Paterson, Snow, & Burney*, agents for Messrs. *Dibb, Atkinson, & Braithwaite, Leeds;* Messrs. *Wright & Venn*, agents for Mr. *C. A. Curwood, Leeds.*

In re ALBERT AVERAGE ASSURANCE ASSOCIATION.

L. J. J.
1870
July 7.

Appeal—Discretion—Appointment of Official Liquidator.

Held, by the Master of the Rolls, that the person proposed to be official liquidator by the person who has obtained the winding-up order ought to be appointed in preference to another candidate, unless there is a strong feeling against him, or some reason to doubt his fairness, and that where the Chief Clerk had acted on that view the Court would affirm his decision, unless such objection to the person nominated was shewn:—

Held, on appeal, that this rule was one which it was competent to a Judge to lay down for his own guidance, and that an appeal would not lie from an appointment on the ground of its having been based on that rule.

An appeal from the appointment of an official liquidator ought not to be allowed unless in a very special state of circumstances.

THIS was an appeal made by *Shaw, Saville, & Co.*, and various other creditors and contributories of *The Albert Average Assurance Association*, to discharge an order of the Master of the Rolls appointing Mr. *Kennedy* official liquidator, and to have Mr. *Robert Fletcher* appointed in his room.

An order having been made for winding up the association on the application of Mr. *Ash*, who was both a member and a creditor, the usual reference was made to Chambers to appoint an official liquidator. Mr. *Ash* proposed Mr. *Kennedy*, and some members and creditors proposed Mr. *Fletcher*. The Chief Clerk determined to appoint Mr. *Kennedy*, but at the request of the Appellants the matter was adjourned into Court. The Master of the Rolls then appointed Mr. *Kennedy* (1). It is unnecessary to enter further

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(1) 1870. May 6.

LORD ROMILLY, M.R.:—

In this case I reserved my judgment for the purpose of deciding which gentleman I should appoint as official liquidator, and I must repeat that the state of the practice upon this point is exceedingly unsatisfactory. In the first place, I certainly never meant to lay down the rule that, under all circumstances, the Petitioner was to have the nomination. It seems to have been supposed that such a rule was laid down by Vice-Chancellor *Malins*, and adopted by me, but all I ever meant to say was this, that, *cæteris paribus*, the person who was nominated by the Petitioner should be appointed. The great difficulty in all these cases is to determine which of two perfectly fit and proper persons is to be chosen, when both of them are quite competent to perform the duties of an official liquidator. It is very difficult to define accurately what is meant by *cæteris paribus*. The statute says that the Court

L. J. J.
1870

In re ALBERT AVERAGE ASSURANCE ASSOCIATION.

into the facts, as the only question argued was, whether the principles laid down by the Master of the Rolls were correct.

Mr. *Swanston*, Q.C., having opened the appeal motion,

Mr. *Jessel*, Q.C., took the preliminary objection that this was

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may take into consideration the number of shareholders or creditors who support one particular person. This is merely permissive, not compulsory, and it was wisely made so, because the Court knows by experience how often consents are obtained from persons who know nothing about either candidate, but give them because they know something about the solicitor. In the present case the solicitors are, for both parties, of the highest eminence, and persons more fit to act as the solicitors of the official liquidator, unquestionably there could not be. So with respect to the candidates; after reading through the affidavits, I really do not see anything to choose between them. Mr. *Kennedy*, indeed, as conductor of his firm, has not had any very great experience, and Mr. *Fletcher* has, but Mr. *Kennedy* has had a great deal of experience in the firm of *Quilter, Ball, & Co.*, whom I know to have been often official liquidators, and, in point of fact, the managing clerks have as much experience and knowledge of these matters as the principals themselves. Then great expense and great delay are occasioned for the purpose of ascertaining which of these two very proper persons ought to be chosen. Now I am totally unable, after reading the judgments of the Lord Chancellor and the Lord Justice *Giffard*, to which my attention was called, to find out any rule at all upon the subject. If I am to estimate the difference between the fitness and the merits of the men, it is positively a feather. I cannot say, on the evidence, which is the better man. Then it is to be thrown into one scale that a number of creditors support Mr. *Fletcher*, and into the opposite one the fact that, *cæteris paribus*, in my opinion the Petitioners' nominee ought to be preferred. I think, then, that if the Chief Clerk exercises his own judgment, and I, upon review of all the circumstances, see no reason to discredit the judgment that he has come to, I ought to adopt his view, and I shall do so upon the present occasion. I shall allow the costs of those who appear for Mr. *Fletcher* out of the estate upon the present occasion, because, since the decision of the Lord Chancellor, it has been difficult to say what the rule is. If the parties like to carry this case to the Lord Chancellor and the Lord Justice *Giffard* and try to get a rule laid down, I shall be very glad, but until corrected by a higher Court I mean to act upon this rule, that when the Petitioner nominates a fit, proper, and respectable person, I shall adopt him *cæteris paribus*, that is to say, unless there is a very strong feeling against him, or unless there is something that may throw a doubt upon his fitness, and that if the Chief Clerk, after examining the case acts upon that principle, then, when it is referred to me I shall affirm his decision, after looking, of course, into the case for myself, as I am bound to do. I shall not consider myself bound to give the preponderance to the creditors if it is a creditors' winding-up, or to the shareholders if it is a shareholders' winding-up, but I shall, *cæteris paribus*, appoint the Petitioners' nominee, defining "*cæteris paribus*" in the manner that I have explained.

an appeal from the discretion of the Judge, and could not be entertained.

Mr. *Swanston*, Q.C., and Mr. *Bagshawe*, for the appeal:—

We contend that this is a question of principle, the Master of the Rolls having laid down a rule, which we submit is erroneous, and having required us to establish a positive objection to the person approved by the Chief Clerk, thus putting the Chief Clerk in the position of the Masters, which is contrary to the spirit of the Act: *In re International Contract Corporation* (1); *In re London, Bombay, and Mediterranean Bank* (2); *Re Agriculturist Cattle Insurance Company* (3); *Re Northern Assam Tea Company* (before the Lord Chancellor and Lord Justice *Giffard*, January 25th, 1870); *In re Western Life Assurance Society* (4).

Mr. *Jessel*, Q.C., and Mr. *E. C. Willis*, *contrà*, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the preliminary objection must prevail. Motions by way of appeal from the appointment of an official liquidator ought not to be brought, except under circumstances of a very special character. Persons ought not to be allowed to carry from Court to Court the question who shall have the profits of a winding-up, the real ground of contest being which solicitor shall name the official liquidator and be employed in the matter. The office of the liquidator is merely ministerial, and the right of appeal in such cases is rather to be restricted than extended. Where a Judge is entrusted with the power of selecting a person for an office, there ought to be no appeal from his decision. It is urged that here there is a question of principle involved. If the Master of the Rolls had laid down any rule, which having regard to the former decisions, was in my judgment erroneous, it would have been my duty to interfere; but it appears to me impossible to say that it was not competent to His Lordship to lay down for his own guidance such a rule as he has laid down in this case; and, if one of the Vice-Chancellors were to lay down for his own guidance a different rule, I should not interfere if I thought it

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(1) Law Rep. 1 Ch. 523. 12 Jur. N.S. 591
(2) Ibid. 525. 12 Jur. N.S. 591
(3) 3 D. F. & J. 194. 7 Jur. N.S. 570.
(4) Law Rep. 5 Ch. 396.

L. J. J.
1870
In re
ALBERT
AVERAGE
ASSURANCE
ASSOCIATION.

such a rule as a Judge might lay down for that purpose. It has been urged as an objection that the Judge ought not to give any weight to the opinion of the Chief Clerk, but to treat the matter as a *res integra*. But I do not think that I ought to interfere with the discretion of a Judge as to the degree of weight he thinks fit to give to the conclusion of his Chief Clerk, provided he looks into the matter himself, which, of course, he is bound to do, since he cannot delegate his judicial functions.

Solicitors: Messrs. *Parker & Clarke;* Mr. *G. E. Ball.*

L. J. J.
1870
July 15.

178, 183.–6
188,

In re BRADFORD NAVIGATION COMPANY.

Winding-up Petition—Locus standi of Respondents—Appeal.

No person has a right to be heard against a Petition for winding up a company, except creditors and contributories. And although the Court may reasonably hear other persons who have an interest in the property of the company as *amici curiæ*, yet such persons cannot appeal against the decision.

Upon a Petition to wind up a canal company, presented by the company, another canal company, whose canal communicated with that of the petitioning company, were heard in opposition to the Petition:—

Held, that the opposing company had no *locus standi* to appeal against the winding-up order.

THIS was an appeal from an order of Vice-Chancellor *Malins*, ordering the winding up of the *Company of Proprietors of the Bradford Navigation.*

The company was incorporated by an Act of Parliament passed in 1771. The water of the canal having become foul, in consequence of the pollution of the stream from which it was derived, the company had been restrained, by an injunction of the Court of Chancery (1), from allowing it to pass into the canal, the effect of which had been that the canal was emptied and disused. The Petition, which was presented by the company, and was not served on any person, alleged that the company could not obtain a supply of water from any other source than the polluted stream, except at a ruinous expense.

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(1) See *Attorney-General* v. *Proprietors of Bradford Canal*, Law Rep. 2 Eq. 71.

The canal communicated with the *Leeds and Liverpool Canal*, and the latter communicated (at a distance of thirteen miles from its junction with the *Bradford Canal*) with the *Aire and Calder Canal*. The *Aire and Calder Canal Company*, appearing by counsel to oppose the Petition, the Petitioners' counsel objected that they had no *locus standi*. The Vice-Chancellor overruled the objection (1), but ultimately made an order to wind up the company (2).

The *Aire and Calder Canal Company* appealed from this order.

On the appeal being opened,

Mr. *Graham Hastings* (Mr. *Pearson*, Q.C., with him), for the Petitioners, renewed the objection that the Appellants had no *locus standi* to appear, as they were neither creditors nor contributories. This was clearly implied by the *Companies Act*, 1862 (sects. 82, 85, 89, and 91), and by the 5th rule of the General Order under the Act, which entitles every creditor and contributory to be furnished with a copy of the winding-up petition. The Appellants had no more interest in the matter than the general public, who could only be represented by the Attorney-General. He referred to *In re Wey and Arun Junction Canal Company* (3).

Mr. *Glasse*, Q.C., and Mr. *Streeten*, for the Appellants, argued that they had a special interest in the continuance of the Petitioners' canal. The *Canal Companies Act* (8 & 9 Vict. c. 42) gave the *Aire and Calder Company* a right to use the Petitioners' canal for the purposes of their traffic. The company proposed to sell the canal under the winding-up, and the Appellants would have no power to prevent them. The effect would be that the property, over which they had rights created by statute, would be lost to them.

SIR W. M. JAMES, L.J. :—

I am of opinion that this preliminary objection must prevail. It appears to me that the Appellants' argument is based upon a misconception of what a winding-up order and what a winding-up petition is. It is a substitute for a suit for winding up a partnership. It is a power applicable by the Act of Parliament to corporations as well as to unincorporated societies. Partners have a right to file a bill one against the other, and to have the usual decree for the administration of the partnership property, and for the settling of the partnership accounts and liabilities. In the case of large companies, winding-up was thought to be a more convenient course than a common partnership suit, but in every other respect it is the same. In a common partnership suit nobody can be made a party, or can be heard, except the partners themselves, and, originally, a winding-up was the same thing. Contributories were the only persons who could be heard; but as creditors were interfered with by the operation of the winding-up, the Act of Parliament has made a winding-up a matter both for creditors and contributories. A creditor may present a petition for winding-up, and both creditors and contributories are heard upon that; but it is new to me to say that any person who has an interest in, or a right to or in respect of, some of the property of the company, large or small, has a right to appear as a litigant here, because that company chooses to apply for an order with respect to itself. In this case the company was desirous of being wound up. I am of opinion that the winding-up order does not in the slightest degree derogate from any right whatever which any member of the public has with respect to this canal. The winding-up will deal with such rights as the partners in the partnership can deal with themselves. The Court will deal with it just as the partners themselves could have dealt with it. They cannot sell it so as to interfere with the rights of the public. If they have been already guilty of any wrong, if they have turned out the water from the canal when they ought not to have done it, they are still liable to an indictment for doing that; and they may be liable to an injunction, or to any proceedings which may be taken against them—just in the same way as if any person had a right of road over a field which was part of partnership assets, a suit for the administration of the partnership assets would not deprive that person of his right of road. If this canal had been a private speculation—like the Duke of *Bridgewater's* canal, for instance—instead of being the canal of an incorporated company, these people might as well have said, "Do not give the Duke of *Bridgewater* or his representative a decree for the administration of his estate without allowing us to be heard as to what is to be done with the canal which is part of his estate." It appears to me that it would be extending litigation beyond all possible limits if every person who may have a right with respect to property which belongs to a company could come here and say that the winding-up will interfere with his rights. The Court would take care of all those rights in the proper mode if the company were attempting to sell, but, in fact, they would probably be unable to sell without the assistance of an Act of Parliament, because nobody could use the land as a canal unless under the authority of an Act, and it might be difficult to sell it for any other purpose. Possibly the result of the winding-up may be to authorize the company to go to Parliament for the purpose of obtaining an Act to enable them to sell and get rid of the public rights. If they can do that, it will be for the persons who have these public or private rights to present their opposition before Parliament in such a manner as they may be advised. In the meantime, the winding-up order, according to my view of the law, does not in the slightest degree derogate from any right whatever which a third person, a stranger, has in respect of the property; therefore, the winding-up order is not an order which affects the Appellant, and I am bound to refuse the Petition of Appeal on this ground. It stands in a different way from that in which it stood in the Court below, because here I am obliged to consider whether the Appellant had a right to present a Petition of Appeal. In the Court below the Court might very well say to a person so situated, "I should be glad to hear you as *amicus curiæ*, if you have an interest, that I may know what public grounds there are." There the Court might use its discretion, and think it right to hear such an objection; but when it comes before me on a Petition of Appeal from the Order, then the Appellant must shew that he fills some character in which he has a right to litigate with the company. I am of opinion that he does not fill any such character, and that the Petition of Appeal must be refused with costs.

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(1) Law Rep. 9 Eq. 80.
(2) Law Rep. 10 Eq. 331.
(3) Law Rep. 4 Eq. 197

Solicitor for the Appellants: Mr. *Darley*.

Solicitors for the *Bradford Navigation Company*: Messrs. *Evans & Foster*.

L. C.
1870
June 3, 10.

12 Eq 15,
9 Ch D 583,

M'CREIGHT *v.* FOSTER.

Assignee of Contract—Notice.

A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract.

A vendor agreed to sell leaseholds which were under a heavy rent, and received part of the purchase-money. The purchaser afterwards agreed to assign to a bank, if required, the contract for the purchase by way of security for money advanced, and the bank gave notice of this agreement to the vendor. The bank afterwards refused to advance to the purchaser the money required to complete, but this was not known to the vendor. The purchaser, after the time fixed for completion, paid the balance of the purchase-money, the vendor executed an assignment, and the purchaser assigned to an assignee without notice of the security to the bank:—

Held, that the vendor was entitled to complete without giving notice to the bank, and that the bank had no remedy against him.

Decree of the Master of the Rolls reversed.

Affd HL 5 HL 321

ON the 30th of September, 1864, Sir *W. Foster*, who was then mortgagee with power of sale, of certain leaseholds called the *Alhambra Palace*, in *Leicester Square*, agreed to sell the same to *A. G. Pooley*, on the terms contained in the following memorandum, dated the 30th of September, 1864, and signed by both parties:—

"I, *Alexander Gopsell Pooley*, of 50, *Lime Street*, in the city of *London*, have this day purchased by private contract the property described in the annexed particulars of sale, including fixtures, as per schedule, at the sum of £22,500, and have paid the sum of £2000 as a deposit, and in part payment of the purchase-money. And I agree to bind myself, my heirs, executors, and administrators, to pay the balance of the purchase-money, and complete the said purchase in all other respects, agreeably to the conditions of sale hereunto annexed, save as far as the same are inconsistent with a sale by private contract, or with the provisions of this memorandum. I agree to take possession of the premises within twenty-one days from the date hereof, and to pay to the vendor the further sum of £5500 on taking possession, and to pay the balance of the purchase-money as follows, viz., £5000 at the expiration of three calendar months from the date hereof, and the remaining £10,000 at the expiration of twelve calendar months from the date hereof. All outgoings to be cleared by the vendor up to Michaelmas, 1864, and by me from that time forward, the deeds to remain in the hands of the vendor until the purchase-money is completely paid, and then to be handed over to me, and a conveyance of the premises to be executed to me in the usual way. The vendor, at my request and cost, to join in granting any lease or leases which I may desire during the time that the deeds remain in his hands."

In pursuance of this agreement, *Pooley* paid to Sir *W. Foster* sums amounting to £12,500, and took possession. On the 28th of January, 1865, he deposited with the *Birmingham Banking Company* the memorandum of agreement, and also other deeds, by way of security for the payment of certain bills of exchange, amounting to £50,000, and at the same time he executed a deed-poll or memorandum of deposit, by which he agreed that he would at any time thereafter, at the request of the trustees of the banking company, execute to them a valid assignment of his contract with Sir *W. Foster* for the purchase of the *Alhambra Palace*, by way of mortgage for securing the said sum of £50,000.

In July, 1865, duplicate notices of this charge were sent by the solicitor of the banking company to Sir *W. Foster*, with a letter in the following words:—

"I beg to inclose you notice, in duplicate, of a charge by Mr. *Pooley* on his purchase of the *Alhambra Palace* from you in favour of my clients, the *Birmingham Banking Company*. Will you be good enough to accept service of the same, and return to me one copy of the notice, with a memorandum of your acceptance of it indorsed thereon? I called on Messrs. *Field, Roscoe, & Francis*, to serve them with the notice on your behalf, but they preferred me to apply to you. I presume there are no other incumbrances as affecting Mr. *Pooley's* purchase."

Sir *W. Foster* received these notices, and returned one, with an acknowledgment of the receipt signed by him. In October, 1865, the solicitors of Sir *W. Foster* wrote to *Pooley*, and on the 7th of November, 1865, Sir *W. Foster* wrote to him urging him to complete, and threatening to file a bill for completion. It appeared from the evidence taken in this suit that, previously to this time, *Pooley* had attempted to procure the money for completion from the banking company, but they had declined to advance it. There was, however, no evidence that Sir *W. Foster* was aware of this. But *Pooley* procured the £10,000, and paid that sum and interest to Sir *W. Foster*, who, on the 23rd of November, 1865, executed an assignment of the property to *Pooley*.

On the 9th of April, 1866, the solicitor to the banking company wrote to Sir *W. Foster*, expressing surprise that the purchase had been completed, and stating that Sir *W. Foster* would be accountable for any loss to the company, as no notice had been given to them prior to completion. The solicitors of Sir *W. Foster* wrote in answer, denying any liability, and no further correspondence on the subject took place until after the banking company was wound up, which was in July, 1866.

On the 8th of May, 1867, the official liquidators of the banking company, filed their bill in this suit against Sir *W. Foster* and *Pooley*, alleging that, immediately after the assignment to *Pooley*, he sold and conveyed the property to a purchaser without notice of the rights of the banking company; that a large sum was due from *Pooley* to the company, and that he was in insolvent circumstances; that the company were ready to complete the contract, and pay to Sir *W. Foster* the balance of the purchase-money, but that they were ignorant that the contract was about to be completed, or the purchase-money paid by *Pooley*, until long after the date of the assignment; that the assignment, without notice, by Sir *W. Foster*, was a wrongful act, and a breach of trust and of duty on the part of Sir *W. Foster;* and that the assignment contained no notice or reference to the interest of the banking company, and was in such form as enabled *Pooley* to defraud the banking company. And the bill prayed a declaration that the assignment was a wrongful act, and a breach of trust and duty by Sir *W. Foster*, and that he was liable to make good the loss to the company occasioned by such assignment.

Sir *W. Foster*, by his answer, stated, as was the fact, that the *Alhambra* was leasehold, the ground-rent being £910, and the insurance and covenants very onerous; and that it had been for some time unlet, though it was now let at an annual rent of £2750. He further stated, that as mortgagee in possession, he was very anxious to dispose of it; and also that, to the best of his belief, the banking company knew that he wished to complete, and had given up all intention of making any further use of the security on the *Alhambra.*

The Master of the Rolls made a decree for the Plaintiff (1), and Sir *W. Foster* appealed.

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(1) 1870. Jan. 19.

LORD ROMILLY, M.R.:—

I entertain no doubt about this case. There is no evidence whatever to induce the Court to suspend the ordinary and usual rule in equity, that any man who enters into a contract may, if he pleases, assign the benefit of that contract, or may charge his contract for the benefit of an assignee, and that, therefore, the person with whom he has contracted becomes a trustee for the assignee as soon as he has due notice of the assignment or charge. For instance, if a person insures his life in an insurance office, and raises money upon the security of the policy, and the person who lends money upon that security gives notice to the insurance office not to pay the money to any other person, then, if the insurance office thinks fit to pay, they must take the consequences and bear the loss, though it is a *chose in action;* so, also, if a man agrees to sell an estate or buy an estate, he may assign the benefit of that contract to another person, either absolutely or to secure a sum of money, and when the person with whom he has contracted has notice of that charge, he becomes a trustee for the person to that extent. There is no difference between one species of property and another.

An endeavour was made, on behalf of Sir *W. Foster*, to take a distinction,—which, in my opinion, would lead to the most disastrous consequences,—between the sale of a lease and the sale of any other property. There is no distinction at all. A man has made a contract which has become beneficial by reason of his having paid part of the purchase-money, and thereupon he raises money upon it and assigns it to another person as a security. Now, what sort of distinction is there between a lessee and an owner in fee simple? It was said, and said with considerable truth, that the situation of a lessee, particularly of a lessee of such a place as this, is very onerous, because he has a ground-rent of £910 to pay every year, and is subject to covenants, not merely to keep the premises in repair and in a proper state, but also to insure against fire. No doubt that was so; but the vendor thought fit to enter into the contract, and there was a proviso in the agreement that there should be a forfeiture if it was not completed by the 30th of September, 1865; and then it was suggested that it would be very hard upon Sir *W. Foster* if he should be interfered with and impeded, and that the contract could not be altered by reason of this assignment. But there was nothing whatever in the assignment to the banking company which enabled either the company or *Pooley* to obviate the consideration of the contract, which made him liable to forfeiture in case the contract was not completed on the 30th of September.

The cases of *Lucas* v. *Comerford* (1 Ves. 235; 8 Sim. 499), and *Moores* v. *Choat* (8 Sim. 508), were cited, but they have no reference to this case. The course which Sir *W. Foster* ought to have taken in this case is as plain as

Sir *Roundell Palmer*, Q.C., and Mr. *W. F. Robinson*, for the Appellants:—

There has never been any assignment to the bank, and it does

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possible. The *Birmingham Bank* got an assignment of the benefit of the contract. The contract was obviously a very beneficial one at that time, because £12,500 had been paid, and by paying £10,000 they could have got the whole of the *Alhambra Palace* conveyed to them, which seems to be worth about £25,000. The course, therefore, which Sir *W. Foster* had to pursue was very simple and very plain; he ought either to have said he would not accept any notice at all —whether he would be entitled to say so is another question—or he might accept the notice and abide by it. He did accept the notice, and then, no doubt, forgot all about it. And in November, nearly two months after the time at which the contract ought to have been completed, he completed the contract with Mr. *Pooley*, without regarding the banking company. But his proper course was quite plain. It was to send word to the banking company that Mr. *Pooley* was about to complete, or that he intended to insist on the forfeiture, unless it was completed within a reasonable time. He ought to have given them a reasonable time, say a week or ten days, and to have said that if the banking company did not complete within that time, he should insist upon the forfeiture. But he did nothing of the sort, and merely conveyed to Mr. *Pooley*, or to his nominee, without the slightest notice to any person whatever. The consequence of which is that the purchaser has taken it as purchaser for value without notice, and can hold it as against all the world.

Now, observe what the consequence would be if I were to hold otherwise. However valuable the contract was which had been entered into by Mr. *Pooley*, and however important it was for him to borrow a little money to complete it, although he might have paid half the purchase-money, he could not safely assign the benefit of the contract in order to raise the money to pay the remainder, because the person who had received notice might convey away to another person. Such a decision would prevent a person making use of a very valuable property for the purpose of raising money which might be required.

The only question in the case on which I was desirous to read the correspondence is this: Did the *Birmingham Bank*, after giving that notice, repudiate all the benefit of the contract? Upon reading the evidence, I am of opinion they did not. This is certain, that in no respect can there be alleged anywhere that there was any notice to Sir *W. Foster* that they had done so, or that any facts came to his knowledge which would justify his proceedings. The manager of the bank seems to have told Mr. *Pooley* that he must get the money himself, and that they did not intend to advance it. If this had been communicated to Sir *W. Foster*, or had come to his ears, and upon that, sincerely believing that they had repudiated the contract, he had sold it to somebody else, although he would have still been in a very equivocal situation, there might be some excuse—there might be something more to have been said for him; but, as the matter stands, there is no excuse whatever.

The consequence is, that I regret to say I must make a decree against Sir *W. Foster*, and must direct inquiry what loss has been sustained.

L. C.
1870
M'Creight
v.
Foster.

not appear that they ever meant to take one; but, even if they had, the assignee of a contract must take it with all its incidents and liabilities: *Tooth* v. *Hallett* (1). There was no contract or privity between Sir *W. Foster* and the bank; his contract was with *Pooley* alone: *Mangles* v. *Dixon* (2); *Daniels* v. *Davison* (3). Of course, if the purchaser had paid all the money, the vendor would be a mere trustee for him; but that was not the case here, and until that is done the vendor's first duty is to himself, and no amount of notice can deprive him of his rights: *Wall* v. *Bright* (4); *Tasker* v. *Small* (5). The sub-purchaser is not even a proper party to a suit by a vendor for specific performance: *Cutts* v. *Thodey* (6). If the bank really meant to complete, they should have come forward and offered to do so, and it was not the business of Sir *W. Foster* to urge them on: *Pearce* v. *Morris* (7). As between himself and *Pooley*, Sir *W. Foster* had but one course to pursue: *Rose* v. *Watson* (8). So far from the bank coming forward, it is clear that they deliberately refused to assist *Pooley* to complete, and left him to take his own course, knowing that if he did not complete his contract would be forfeited. Then of what has Sir *W. Foster* notice? Not of any assignment, but merely that at some time the bank might call on *Pooley* to assign. In all probability the bank would never have taken it. It was not at all a desirable property, and Sir *W. Foster* was himself anxious to get rid of it. The bank now tries to make Sir *W. Foster* liable, but can any one believe that they ever intended to take this property?

Mr. *Southgate*, Q.C., Mr. *A. Smith*, and Mr. *Chitty*, for the Plaintiffs:—

No doubt it is hard upon a vendor or a trustee to have to keep in mind the notices he may receive, but such is the law. We admit that we could not have delayed Sir *W. Foster* from enforcing completion, but we say that he ought to have given us notice before he completed. He might, if *Pooley* had insisted, have taken the money, but he was not bound, in the face of our notice, to

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(1) Law Rep. 4 Ch. 242.
(2) 3 H. L. C. 702.
(3) 16 Ves. 249, 255.
(4) 1 Jac. & W. 494.
(5) 3 My. & Cr. 63.
(6) 13 Sim. 206; 1 Coll. 223, n.
(7) Law Rep. 5 Ch. 227.
(8) 10 H. L. C. 672. 10 Jur N.S. 297

L. C.
1870
M'Creight
v.
Foster.

convey the estate, and so enable *Pooley* to commit this fraud. *Pooley* had passed his interest in the *Alhambra* to the bank, and the bank, by giving notice to Sir *W. Foster*, made the assignment complete: *Dearle* v. *Hall* (1). We do not impute any design to defraud, for we believe the fact to be that Sir *W. Foster* had forgotten the notice, but still he must take the consequences of forgetting: *Burrowes* v. *Lock* (2).

Mr. *Hull*, for *Pooley*.

Lord Hatherley, L.C.:—

This is, in my opinion, a case of the first instance, and is not governed by any previous decisions. The Master of the Rolls seems to have come to the conclusion to which he did come upon the well-known doctrine that a trustee cannot do anything whatsoever in derogation of the rights of his *cestui que trust*, and those *cestuis que trust* may be constituted, no doubt, either by an original trust, or by an assignment from the original *cestui que trust* to other *cestuis que trust*, and then by notice of the assignment, which thus creates the relation of trustee and *cestui que trust* between the two. That doctrine is perfectly familiar to the Court, but it cannot be applied to a case of this description.

5 H.L. 3[illegible]

It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does in a certain sense exist between vendor and purchaser; that is to say, when a man agrees to sell his estate, he is trustee of the legal estate for the person who has purchased it as soon as the contract is completed, but not before. He has so far, having entered into that agreement, precluded himself from entering into any other contract as to the estate until it is decided, either by law or by the acts of the parties, that the contract first entered into has been rescinded. But contracts of this description cannot be dealt with piecemeal, and a vendor has a right to have his contract fulfilled *in toto*, and cannot be compelled to split up the performance of the contract into several parts.

What has happened here? The vendor, Sir *W. Foster*, agrees with Mr. *Pooley* to sell to him for a given price, payable by instalments.

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(1) 3 Russ. 1.

(2) 10 Ves. 470.

Part of the money was paid, and £10,000 remained, which was to be paid in September, 1865. In the meantime Sir *W. Foster* received from the *Birmingham Banking Company* notice of *Pooley's* agreement with them, and the Plaintiffs now contend that thereupon Sir *W. Foster* became affected with a trust securing to the company the benefit of *Pooley's* charge of £12,500, and became unable to complete his contract with *Pooley* without giving the company distinct notice that he was about to complete it, in order that the company might interpose and say that they would complete it instead of *Pooley*, and would have the conveyance made to them instead of to *Pooley;* or, if Sir *W. Foster* did not do so, then he should have insisted on Mr. *Pooley* admitting, on the face of the conveyance, that he took it subject to the claim of the company.

No authority has been cited for these propositions, but I am told that I should be interfering with the assignability of contracts if I were to hold that persons in the position of Sir *W. Foster* were to be at liberty to convey to the person with whom they first dealt after notice of such a contract by him; yet, on the other hand, I should embarrass all future vendors, and should interfere far more with the freedom of the sale of land, if I held that a party to a contract could be arrested in the course of his proceeding to enforce or complete that contract by a notice that the other party had engaged to give some one else the benefit of the contract by way of security for money lent, and that the person who gives the notice of this security, as to which nothing is known except that the assertion is made, has a right to assist at the completion, and to insist that the completion of the contract shall be arrested until the rights are determined between the party to the contract and this third party.

On all principle that seems to me to be quite contrary to what this Court has constantly held. The contract was a contract between two parties, and between them only, subject, no doubt, to this, that if the whole interest in the contract be parted with, the other party to whom it is given may have a right to interfere, and is entitled to assert it, if he thinks fit, in this Court; but it has never yet been held that, by simply serving a notice, he puts him-

L. C.
1870
M'Creight
v.
Foster.

self in a position to arrest the completion of the contract between the two parties, and do that with reference to this description of property which he can do with reference to personal estate under certain circumstances, according to the authority of *Loveridge* v. *Cooper* (1) and *Dearle* v. *Hall* (2), viz., stay the holder of the fund from dealing with it, because the person giving the notice has acquired a separate interest in it, and made himself *cestui que trust*, instead of the original party to the trust.

The distinction is this—it is not the simple distinction of real and personal estate, but it is this distinction—that the vendor is not a complete trustee for the purchaser, and those who claim under him, until the whole contract is finally completed; and during that stage, I apprehend that other persons, by saying that they have acquired an interest in the agreement, will not stay the performance of the agreement with the original purchaser. The duty imposed on those who wish to intervene is to take their own steps, to file their own bill, and to claim the benefit of the contract in such a way that the Court may have the opportunity of dealing with the matter according to the rights of the parties interested in it, and may determine their position accordingly.

I asked, during the course of the argument, what would have been the position of Sir *W. Foster* if *Pooley* either paid or offered to pay the money, and then had filed his bill to have completion of the contract? I apprehend that Sir *W. Foster* would have been compelled to perform specifically his contract with *Pooley*, and to pay the costs of the suit; and the fact of other persons having given their notice, and not following it up by payment of the money, or by any step to complete the contract, would not be any defence.

The case of —— v. *Walford* (3) is as strong a case as anybody could imagine for testing the principle. A distinction was made by Mr. *Southgate* that *Pooley* has not said, as was said in that case, that he will make a mortgage to the company of the property when conveyed to him, but that he will convey the property itself. But still that case, as I apprehend, would be an authority for saying that, if Sir *W. Foster* had raised this contest at the hearing in a suit by *Pooley*, and *Pooley* alone, without joining the other parties, the only consequence to him would have been that he would have had to pay the costs of the suit, and would have been compelled to convey to *Pooley* on his paying the money. The banking company knew that the contract was to be performed in September, but, beyond the notice, not a single communication did they make with Sir *W. Foster*, and he did not convey until November. If they had been in the least minded to perform the contract they would have performed it, or offered to perform it, in September; but not until April, 1866, did they make to Sir *W. Foster* any offer to fulfil that engagement, without the fulfilment of which he never could be made their trustee or the trustee for anybody, because the contract he had entered into had not been completed.

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(1) 3 Russ. 30.

(2) 3 Russ. 1.

(3) 4 Russ. 372.

The facts in this case are strongly against the Plaintiffs, even if they established the principle; but I apprehend that the principle is not so. No authority has been cited for it, and what was said in the case of —— v. *Walford* (1) and in *Rose* v. *Watson* (2) is all against it.

I thought it right, having a very strong opinion on the case, to deal with it upon the highest ground on which it could be put, but I am far from saying that that is the sole ground on which it should be put, when the only notice that Sir *W. Foster* received was that Mr. *Pooley* had arranged with the bank that he would at their request and at his own cost execute to them a valid assignment of the contract. It is not a mere trifling with words or splitting of hairs in this case to consider whether or not that is equivalent to saying he had actually assigned the benefit of his contract, because it was a contract for the purchase of a leasehold interest at a very heavy ground-rent, and subject to great liabilities; and if they actually insisted on having the whole benefit of the agreement, they would have £10,000 more to pay down, and then to take an assignment of the lease, subject to all the covenants. I do not wonder at their never doing it, and I do not wonder at it appearing on the evidence that, when the time came for completion, they told Mr. *Pooley* that they would not find the £10,000 for him, but that he must look about to see where he could find the £10,000. That was not communicated to Sir *W. Foster*, but it

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(1) 4 Russ. 372.

(2) 10 H. L. C. 672. 10 Jur NS 297

L. C.
1870
M'Creight v. Foster.

is a somewhat strong illustration of what would be the consequence of asserting for the first time this equity, that persons who have an engagement by way of mortgage, or a contract, which may or may not turn out to be beneficial, may simply serve a notice, do nothing towards completion, but stand by, and say at the end to the vendor that he ought to have given notice of his intention to have the engagement performed, and that he must be fixed with all the consequences of not having done so. I think it is a wholly new attempt, which cannot be justified; and, as far as authority goes, it only guides me the other way. I think, therefore, that the bill should have been dismissed with costs, and that must be the present order. Of course there will be no costs of appeal.

Solicitors for the Plaintiffs: Messrs. *Dale & Stretton.*
Solicitors for Sir *W. Foster:* Messrs. *Field, Roscoe, & Co.*
Solicitor for *Pooley:* Mr. *Mount.*

L. C.
1870
June 24, 29.

7 Ch 747
19 Eq 509
7 H L 535.
18 Ch D 584

In re COBRE COPPER MINING COMPANY.

WESTON'S CASE.

Winding-up—Contributory—Scrip-holder—Transfer to an Infant.

Edward W. was the holder of shares in a company, the shares in which passed by delivery of the certificates. Resolutions were passed in July, 1866, at a meeting which *E. W.* attended and took part in, to register the company as a limited company under the *Companies Act*, 1862. Shortly afterwards *E. W.* gave his certificates to his son *Ernest Mortimer W.*, aged seventeen, and living in his house. The certificates were sent in by the son and exchanged for shares, and the name of *Ernest Mortimer W.* was entered in the share register-book, and sent in to the Registrar of Joint Stock Companies upon the registration of the company in December, 1866. *Edward W.* also bought some shares in the name of his son, and they were so registered.

In February, 1867, *Edward W.* informed the managing director that he had parted with his shares; and in June, 1867, in answer to a repeated application for calls, *Ernest Mortimer W.* wrote that he was unable to pay, and, as to legal proceedings, was an infant. No steps as to these shares were taken by the company until after the winding-up in February, 1869:—

Held, that *Edward W.* was liable as a contributory in respect of the shares.

Decision of *James*, V.C., affirmed.

THIS was an appeal motion from a decision of Vice-Chancellor *James*, on behalf of *Edward Weston*, that his name, which had been settled on the list of contributories of the *Cobre Copper Mining Company, Limited*, as a contributory in respect of seventy-five shares, might be excluded from the list.

The *Cobre Copper Mining Company* was established in 1835, under a deed of settlement, as a common partnership, with shares passing to the holder of the certificates, it being provided "that the certificates delivered by the directors pursuant to the deed of settlement to the proprietors of shares in the association shall, as between the association and the holders or bearers of such certificates respectively, be conclusive evidence on behalf of such holders or bearers that they respectively are proprietors in the capital of the association in respect of the shares mentioned in such certificates respectively."

The constitution of the company is fully set out in *Kelk's* and *Count Pahlen's Cases* (1).

In 1865 *Edward Weston* purchased fifty fully paid-up shares in the company for £1800. On the 31st of July, 1866, a meeting of the company was held, at which it was resolved to increase the capital of the company and the nominal amount of the shares, and to register the company under the *Companies Act*, 1862, as a company limited by shares, with a nominal capital of £600,000, in 12,000 shares of £50 each (a further liability of £10 per share being thus created). Resolutions were also passed for repealing various clauses of the deed of settlement and substituting other provisions; in particular, the directors were to give notice to and require the holders of the then existing certificates of shares to deliver the same, with their names, residences, and descriptions written thereon, at the office of the company within a limited period, to the intent that the name, residence, and description of every person then holding any of those certificates, and the number of shares comprised therein, might be entered in the share register-book; that every person so registered should be bound to observe the rules of the company, and that the existing certificates might be cancelled and fresh ones delivered. It was also resolved (in substitution for a provision in the deed of settlement) "that no person, being the holder or bearer of or entitled to any of the now existing certificates, shall, after the issuing by the court of directors of the notice calling in the now existing certificates, be entitled in respect of his or their share or shares to receive any dividend, or otherwise to participate in any profits of the company, or to exercise any privilege as or for any purpose to be considered a proprietor of a share or shares in the company, unless and until he delivers his now existing certificate or certificates, with his name, residence, and description written thereon, at the office of the company for cancellation."

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(1) Law Rep. 9 Eq. 107.

These resolutions were confirmed at a meeting held on the 21st of August, 1866. Mr. *Weston* attended the meeting of the 31st of July, and took part in the discussion by recommending the adoption of the proposed resolutions. He also attended the meeting of the 21st of August, but did not vote, having, as he said, determined not to join the new company. He shortly afterwards gave the scrip certificates of his shares to his son *Ernest Mortimer Weston*, then seventeen years old, a clerk in a stockbroker's office, living with his father at 79, *Westbourne Terrace.*

On the 4th of October a printed circular was sent to those shareholders whose addresses were known, annexing a copy of a resolution of the directors making a call of 10*s.* per share, payable on the 15th of October, and inclosing a form of application for the banker's receipt, on payment of the call, to be filled up by the shareholder. The call of 10*s.* per share was paid upon the fifty shares, and the form was filled up with the name of *E. M. Weston*, and returned to the office. On the 15th of October *Edward Weston* instructed his brokers to buy twenty-five additional certificates in the company for his son. The shares were accordingly purchased in the name of *E. M. Weston*, and the form for the bankers' receipt for 10*s.* per share was sent to the office, signed "*Ernest M. Weston*, 79, *Westbourne Terrace.*"

On the 31st of October a circular was sent out to the shareholders calling attention to the resolutions of the 31st of July, and requiring the holders of share certificates to deliver the same, with their names and addresses, at the office of the company by the 3rd of December, for the purpose of placing the names of the holders upon the share register-book. On the 8th and 9th of November *E. M. Weston* left at the office, in his own name, the certificates for the seventy-five shares, and a receipt was given to him.

On the 13th of December, 1866, the company was registered as a limited company under the *Companies Act*, 1862; and the list of members contained the name of *Ernest Mortimer Weston* for twenty-five and fifty shares. In the share register-book appeared the name of "*Ernest Mortimer Weston*, 79, *Westbourne Terrace*," for the twenty-five and fifty shares.

On the 8th of January, 1867, a further call of £2 per share was made, and notice of it was sent to *Ernest Mortimer Weston*.

In February, 1867, Mr. *Shairp*, the managing director, wrote to *Edward Weston*, inviting him to act as a member of a committee of shareholders. *Edward Weston* wrote in reply, on the 23rd of February, 1867:—

"Having purchased my shares in the *Cobre Copper Company* about twelve months since, at £36 per share, I was so disappointed with the recent accounts that I parted with my interest, and am not therefore in a position to act upon the committee."

On the 8th of April, 1867, a further call of £1 per share was made, and no notice of the calls having been taken by *Ernest Mortimer Weston*, to whom notice of both was sent, a letter was written threatening him with legal proceedings.

In answer to such letter, *Ernest Mortimer Weston* wrote as follows on the 18th of June, 1867:—

"Referring to your letter of the 8th instant (which I inclose), I beg to state that I am unable to pay the call; and, as regards legal proceedings, I beg to state that I am under age.

"Believe me, yours truly,

"*Ernest Mortimer Weston*."

After receiving this letter the directors instructed their solicitors to communicate with *Edward Weston*, who, on the 19th of July, 1867, wrote to them, saying:—"I have never been a shareholder in the company alluded to by you in your letter of the 18th instant." The solicitors of the company thereupon wrote to *Edward Weston* asking for an explanation, but received no answer.

On the 23rd of December, 1868, a resolution was passed for a voluntary winding up of the company, which was confirmed on the 13th of January, 1869; and on the 27th of February, 1869, an order was made continuing the winding-up under the supervision of the Court.

Edward Weston's name having been placed on the list of con-

L. C.
1870

Weston's Case.

tributories in respect of the seventy-five shares, he moved that his name might be removed; and in his evidence he stated that he had in 1866 made a present of the fifty shares to his son, and had paid the calls for him, and that the twenty-five shares were also bought for the son.

The managing director of the company deposed that, until the receipt of *Edward Weston's* letter of the 23rd of February, 1867, he was under the full belief that *Edward Weston* had continued a shareholder of the company, and his (the deponent's) attention had not been called to the fact that the certificates which had been sent in for cancellation in the name of *Weston* had been sent in in the name of *Ernest Mortimer*, and not of *Edward*. He also stated that the letter of the 18th of June, 1867, gave the first intimation to the company that *Ernest Mortimer Weston* was under age.

The Vice-Chancellor *James* refused the motion with costs (1), and *Edward Weston* appealed.

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(1) 1870. May 5.

Sir W. M. James, V.C.:—

I am of opinion that this device will not do. The company was originally, no doubt, a company consisting of holders of scrip, and so constituted that there was to be no liability for calls, and holders of shares were at liberty to sacrifice them if they thought fit. In 1866 some of the persons interested in the company were minded to constitute themselves into a new company, with limited liability. *Edward Weston* was one of the shareholders who took part in the proceedings. He was present and took part in the meeting of the 31st of July, 1866, at which it was agreed that the company should be so constituted anew. A resolution to that effect was passed and duly confirmed. Then, having certain scrip certificates, he gave them, as he says, to his son, who was an infant, residing with him, under his control. Those certificates were sent in by the son, and the son's name was registered; the company being at the time unaware that they were registering any name but that of the father. They swear they did not know there was any distinction between the two, and certainly were unaware of the infancy or of any other incapacity of the son until long afterwards. Then the father was minded to buy some more shares in the market. He was the person who employed the brokers, he was the person who paid the purchase-money, he gave in the name of an infant son as the person for whom they were bought. Those certificates again were sent in in the same way, and by these means shares were obtained in the company; an entry was made in the books of the ownership of those shares, which, if they turned out profitable, would have entitled the person in whose name they were, whether father or son, to have a share of the profits; that is to say, somebody became in this way entitled to participate in the profits of the company. It is not a case in which scrip was destroyed—in which a man gave up all interest in the company—

Mr. *Hardy*, Q.C., and Mr. *Higgins*, for the Appellant:—

The company recognized the son as a shareholder, and cannot now be allowed to get off by saying that they made a mistake. The whole transaction was complete when the father handed the shares to the son. The company sent in the son's name, and he was duly registered as the shareholder: the father never intended to become one in the registered company. What equity have the creditors against him? He was never in any way held out to the world as a shareholder in the registered company. And as between him and the other shareholders, there was clear laches by the officers of the company: *Parsons' Case* (1). The holder of certificates is guilty of no fraud if, knowing that the company is going to be registered, and disliking the responsibility, he hands his certificates to some one else. It is now too late for the company to try and get the register rectified.

Mr. *Kay*, Q.C., and Mr. *Bagshawe*, for the official liquidator:—

It is the duty of the transferor to see that the shares are properly placed in the name of the transferee, and until that is done he remains liable: *Capper's Case* (2); *Mann's Case* (3). The certificates must be handed over *boná fide*, in order to relieve the shareholder.

Mr. *Hardy*, in reply.

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but it was a mode by which these shares were kept as existing shares, with a right to participation in the profits. When the thing turns out to be a failure it is said, "It is very true that we were apparently shareholders with you, but the person in whose name they were entered was an infant. He, of course, is not liable to contribute, and I am not liable to contribute." I think the moving person in this was the father; the father was the person who, in the name, and through the medium, and by means of the son, obtained the shares. The father was the person who was at the bottom of the whole thing, and contrived that device; and, as between him and the company, I hold the father must contribute with the other shareholders to the loss which has accrued in the same way as he would have obtained for his son the benefit if it had resulted in a profit. With regard to laches, after the letters complaining and asking for an explanation, I do not think there is ground for saying there was any laches.

(1) Law Rep. 8 Eq. 656.

(2) Ibid. 3 Ch. 458.

(3) Ibid. 459 n.

June 29. LORD HATHERLEY, L.C., after stating the facts of the case, continued :—

There is no doubt that the shares were handed over to the son, and that, if he had been of full age, he would be and remain upon the register; but he was a boy of seventeen years of age, which, of course, was perfectly well known to his father. If this had been a case of simple transfer, the authorities shew that the transfer would have been invalid; and Mr. *Edward Weston* being a shareholder of a company of the ordinary character, would have remained a shareholder after the winding-up, because it could not possibly be assumed, after the winding-up, that the infant would ever adopt for his benefit the shares which were so handed over to him. The authorities have completely and clearly decided that it must be taken that, at the time of the winding-up, the transaction was utterly fruitless, and that the person who was the original shareholder remains the shareholder, even in cases where he was entirely innocent of the transaction, and not aware that the shares were being transferred to an infant.

But, in the present case, Mr. *Edward Weston* contends that he, in holding these certificates, was liable to nobody, and might have passed them to anybody in the street; and that, when he ceased to be holder, his liability also ceased.

However, I cannot hold him to be in that position; for I think that this case is somewhat worse than the ordinary case. As a certificate holder he attended the meeting of July, and knew exactly what was intended to be done. He knew, therefore, what liabilities were to attach, and of course what benefits were to be claimed by the persons who chose to place themselves in that position. It is one thing to say that he might have passed away those certificates to another person, who might then be called upon either to come and register himself, or to have the shares declared forfeited; and it is another thing to make this use of the certificates. He has them, and he makes use of them; he puts them into the name of his son, a boy of seventeen, and he maintains that, having done so, and having procured these shares to be registered, he is in a position to say that, if the thing turns out well, he will take the profits, if the thing turns out ill his son will answer that he is the holder and is an infant. I cannot entertain any such proposition. It seems to me that the Vice-Chancellor was right in simply describing this as a device by which Mr. *Weston* endeavoured to secure any possible benefits which might result from the transaction, and at the same time to escape from all liability if the transaction should result in a loss.

In other words, in looking at the substance of the case, I must regard Mr. *Weston* at this moment as being the holder of the certificates, and as having registered these certificates in the name of a person himself incompetent to be dealt with as in any way the registered proprietor of the shares; and that, having so done, he must take the liabilities which attach not only on the shares he originally held, but on those which he procured in the market for the express purpose of carrying on that which I cannot regard in any other light than an attempt to defraud the company of the benefit of those resolutions which he had himself concurred in for the future wellbeing and carrying on of the company.

It appears to me, therefore, that he must now be liable in respect of the whole number of these shares; and that he must pay the costs of this appeal.

Solicitors: Mr. *H. Harris*; Messrs. *Upton, Johnson, & Co.*

MILLS *v.* NORTHERN RAILWAY OF BUENOS AYRES COMPANY.

L. C.
1870
June 29.

Company—Ultrà vires—Injunction—Locus standi of Plaintiff—Simple Contract Creditor — Equitable Shareholder — Averments of Illegality — Recouping Revenue out of Capital.

A simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt.

A shareholder in a company who seeks to restrain the company from doing an *ultrà vires* act must shew, by distinct and definite averments, the illegality of the act.

Whether persons having an equitable interest in shares, but not being registered shareholders, can file a bill to restrain a company from doing an *ultrà vires* act, *quære*.

Where a company have paid for things, properly chargeable to capital, out

L. C.
1870

Mills
v.
Northern Railway of Buenos Ayres Company.

of revenue, they are justified in recouping the revenue account at a subsequent time out of capital; and may, if necessary, raise fresh capital under their borrowing powers for that purpose.

Decision of *Stuart*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, granting an interlocutory injunction against the *Northern Railway of Buenos Ayres Company, Limited*, under the following circumstances:—

The company was established in July, 1862, and registered under the *Companies Act*, 1862. Its main object was stated in the memorandum of association to be as follows:—

"The making, purchasing, or otherwise acquiring and maintaining, managing, and working of railways and tramways, and other roads and ways, in the state of *Buenos Ayres*, or in the states of the provinces of the *Argentine Confederation*, with branches therefrom respectively, and the making or providing of machinery, rolling and other stock, plants, stores, and conveniences for the purposes thereof, and the conveying passengers, animals, and goods on and to and from the railways, tramways, roads, ways, and branches of the company, and the carrying on the business of a railway and tramway company. But, unless and until the company shall increase their original capital of £250,000, the undertaking of the company shall be confined to a railway and tramway from *Buenos Ayres* to *San Fernando*, authorized by the Government concession of the 25th of February, 1862, and to the further extension of the said railway to the River *Tigre*, and to such of the several objects in the memorandum mentioned as the company shall think necessary, incidental, or advantageous thereto."

Among other subordinate objects were mentioned "the doing of all other things whatsoever which the company shall think directly or indirectly incidental or conducive to any of these objects, or likely to be advantageous to the company in connection therewith, and the doing of all things, and the exercise of all powers contained in the articles of association of the company."

The original capital of the company consisted of £250,000, divided into 1500 guaranteed preference shares of £10 each, 600 deferred preference shares of £10 each, and 4000 ordinary shares of £10 each. By the articles of association it was provided that the company, with the sanction of a general meeting, might increase the capital of the company by the issue of new shares; and power was given to the directors to borrow any sum or sums not exceeding £150,000, on debentures or other securities.

On the 22nd of August, 1862, an agreement was made between the company and the firm of *E. Murray & Co.*, which consisted of *J. R. Croskey* and *Eugene Murray*, that the firm should construct a single line of railway from the gasworks at *Buenos Ayres* to *San Fernando*, and a single line of tramway from the custom-house at *Buenos Ayres* to the station at the gasworks. The price fixed was £100,000, which was to be paid partly in cash and partly in ordinary shares of the company, with an option to the company to pay the whole in cash in lieu of shares. The agreement contained a clause for referring questions between the parties to arbitration.

The works were performed by Messrs. *E. Murray & Co.*, and they received payments in money and shares on account of the contract; but they still claimed £64,849 from the company, partly under the contract and partly for extra works. This debt was disputed by the company, who, on the contrary, claimed that a large sum was due from the firm to the company.

On the 30th of April, 1870, the directors issued a report, in which they stated that they had a balance in hand of net profits of £32,681 3*s.* 2*d.*; that the charge for interest upon the company's loan capital, &c., was £5838 6*s.* 2*d.*, leaving, after lending to the capital account £10,350 17*s.* 4*d.* for special expenditure, £16,491 19*s.* 8*d.* available for distribution. The directors recommended that this sum should be applied in payment of the arrears of dividend due to the guaranteed preference shareholders for the eighteen months ending the 30th of June, 1867.

The directors explained, in a subsequent paragraph of their report, that the payment of the arrears out of accumulations of revenue would occupy a considerable time, and that in order to accelerate the desired result a certain amount must be funded; and that as legal difficulties prevented this until the revenue was sufficient to enable the company to declare equivalent dividends, and as expenditure was being incurred in new works and additional plant, which might be legally charged to capital, it was recommended, under the advice of counsel, that the amount expended last year under the above-mentioned heads, as well as that to be expended in the present year and 1871, estimated at about £10,000, should be treated as a payment on capital account, which would be afterwards discharged out of a sum of £20,000, which they purposed to raise by issue of debentures at £6 per cent. The report also recommended the conversion of the tramway from the custom-house to the principal station into a railway adapted for locomotive engines.

This report was adopted at the general meeting of the company held on the 16th of May, 1870, and the sum of £16,491 19*s.* 8*d.* was distributed according to the proposal contained therein.

The bill (par. 39) contained the following charge:—"The effect of the proposal contained in the report is, that sums which have been paid out of revenue, and ascribed in the accounts of the company to revenue account, are now to be treated as payments on account of capital account, and considered as having been borrowed for the purpose of capital from the revenue, so as to create an apparent or fictitious fund for the payment of shareholders. The money for this purpose is proposed to be raised by means of the issue of debenture stock, and the effect of the proposal is to increase the liabilities of the company by the issue of debenture stock, for the purpose of borrowing money, in order to distribute the same among the shareholders under the guise of revenue."

The Plaintiffs were *Robert Mills*, the executor of *Eugene Murray*, who was dead, and *H. W. Spratt* and *J. R. Stebbing*, the trustees of a deed of assignment executed by *J. R. Croskey* for the benefit of his creditors. The bill alleged that *Mills*, as the executor of *E. Murray*, held some fully paid-up deferred preference shares of £10 each. The bill prayed for an account and payment of what was due to the Plaintiffs under the contract, and for other works; and for an injunction to restrain the company from carrying out the proposal in the report, and from issuing any debenture stock or applying any money raised by debenture stock on debentures in payment of any dividend to any of the shareholders, and from declaring or distributing any dividend until they had paid or made provision for paying what was due to the Plaintiffs; and also from converting the tramway into a railway until the company had duly increased their original capital. The Plaintiffs moved for an injunction in similar terms.

The Defendants put in a plea and answer to this bill. They pleaded, first, that the Plaintiff *Mills* had no shares in the company, alleging that he had parted with all the shares which he held as executor of *E. Murray* before the filing of the bill; and, secondly, that the firm of *E. Murray & Co.* had not performed the contract on their part, by reason of which default the company had a claim against them exceeding the amount due from the company; and, further, that arbitrators had been appointed by both parties in pursuance of the agreement, by whose arbitration the company were ready to abide.

The Plaintiff *Mills* filed an affidavit, stating that, although it was true that he had transferred all the shares which he held as the executor of *Murray*, he had done so by way of mortgage only; and that, since the filing of the bill, in order to avoid the objection raised by the plea, he had taken a retransfer of some of the shares from the mortgagor. He also stated that other shares were held by other persons in trust for him and the other Plaintiffs.

The Vice-Chancellor granted an injunction as prayed till further order; and from this order the company appealed (1).

(1) 1870. June 23.

Sir John Stuart, V.C. :—

The Plaintiffs have filed their bill as entitled to large sums of money due to the contractors under the contract with the shareholders of the *Northern Railway Buenos Ayres Company.* One of the Plaintiffs is also a shareholder, holding deferred preference shares. The answer, which is called a plea, but it is an answer, denies that *Mills*, the Plaintiff, is entitled to such shares, and says that he has transferred them. But it appears, from the uncontradicted evidence in his last affidavit, that some of the shares which he transferred to a person of the name of *Roncorni* have been retransferred to him, and he swears that he is also the owner of other shares of the same character, deferred preference shares, which are held by persons as trustees solely for himself. The constitution of the suit, therefore, is right, being based upon the claim of the contractors and of *Mills* himself, as the owner of the deferred preference shares.

The question now is, whether the company ought to be restrained from that proceeding which they are about to take, and which is announced in the report made on the 15th of May last. What they proposed to do was this: With the Plaintiffs claiming to be creditors, and with *primâ facie* evidence that they are creditors, being unpaid and having been unpaid for years, the company last month divided a sum of no less than £15,000 amongst the holders of guaranteed preference shares, and in order to continue the

L. C.
1870

Mills
v.
Northern
Railway of
Buenos Ayres
Company.

Sir *Roundell Palmer,* Q.C., Mr. *Greene,* Q.C., and Mr. *Locock Webb,* for the Appellants:—

Even if there was anything *ultrà vires* in what the company proposed to do, which we deny, the Plaintiffs, not being registered shareholders at the time of filing the bill, had no *locus standi* to restrain them.

Secondly, the Plaintiffs, as simple contract creditors, with no lien on any part of the property of the company, cannot sustain such a bill as the present, which seeks to interfere with the management of the company and restrain the payment of dividends.

They were stopped by the Court.

Mr. *Dickinson,* Q.C., Mr. *Marten,* and Mr. *E. C. Willis,* for the Plaintiffs:—

The Plaintiffs sustain the character both of shareholders and creditors. At the time of filing the bill the Plaintiff *Mills* was owner of several shares, subject to the rights of the mortgagee, and

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same course of dividing profits it was proposed to incur a new debt by raising a very large sum of money upon debentures. What is before the Court now is the application on behalf of the Plaintiffs to restrain that proceeding on the part of the directors.

Looking at the account of the state of the company, and at all that appears on the evidence in the case, it seems very clear that the directors are proceeding in a manner wholly unwise and inconsistent with their direct obligations. I observe that the injunction is sought in very wide terms to restrain them from declaring any dividends whatever, and to restrain them generally from applying any assets of the company in payment to the shareholders. That, at first sight, seems a large demand; but, considering what appears on the evidence, it seems to me that the Court would not be justified in allowing them to proceed further to deal with the assets of the company in the way of paying anything to the shareholders, or in incurring any new debts, until something more satisfactory than at present appears is to be done with reference to the Plaintiffs.

It may be observed also that *Mills,* who is himself a deferred shareholder, objects to the directors being allowed to deal with the funds in the way that they propose; and this application deserves the more attention, because one of the professed objects of the proceedings of the directors is, that they may pay arrears to the guaranteed preference shareholders. Now that one of the Plaintiffs, himself a holder of deferred shares, disapproves of this course of conduct, is a very strong circumstance; but, independently of that, it seems to me that the company and its directors are not justified in the course of proceedings that they are proposing, and that therefore this injunction must be granted until further order.

L. C.
1870
MILLS
v.
NORTHERN
RAILWAY OF
BUENOS AYRES
COMPANY.

he was equitably interested in some other shares. But, independently of that interest, the Plaintiffs may, under the contract, be paid part of their money in shares; and if the company had not made default, the Plaintiffs would now either be fully satisfied or else possess shares to a considerable amount. The company, therefore, cannot take advantage of their own default by pleading that the Plaintiffs are not shareholders.

With respect to the Plaintiffs' claim as creditors, it is true that the simple creditors of an ordinary partnership cannot file a bill to restrain the partners from parting with the assets or dividing the profits; but that is a case of personal liability only. The Plaintiffs, on the contrary, are creditors of a limited company, and gave credit, not to the shareholders, but to the assets of the company. It would, therefore, be unreasonable if they could not restrain the wasting of those assets. Suppose the case of a company whose shareholders have all fully paid up their calls, and yet the railway, or other works from which all the profits proceeded, had not been paid for. Would the Court allow the directors to go on paying away all the profits to the shareholders without providing for the payment of the contractors? In what other way could the contractors look for payment? There can, in fact, be no net profits till the works and plant are paid for.

With respect to the proposed scheme of the directors, it is clearly *ultrà vires.* It is a scheme for paying the dividends by means of a loan, which the Court will not sanction: *Macdougall* v. *Jersey Imperial Hotel Company* (1). The conversion of the tramway into a railway is not a trifling matter, and to do it without increasing the capital of the company would be in direct contravention of the memorandum of association.

LORD HATHERLEY, L.C.:—

The Vice-Chancellor appears to have formed his judgment in this case, partly at least, upon the view which he took that one of the Plaintiffs, Mr. *Mills,* was a shareholder in the company, and therefore had a right to interfere. But, so far as the case rests on the simple fact of the Plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a

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(1) 2 H. & M. 528. 10 Jur N.S. 1043.

L. C.
1870
Mills
v.
Northern
Railway of
Buenos Ayres
Company.

limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, "Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultrà vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment."

The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course it would apply not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company.

That being beyond any doubt, I come next to the question whether these persons are shareholders or not. But I do not propose to decide that question, for this reason, that I cannot find even an averment—and the bill appears to be demurrable upon that ground—of anything being done *ultrà vires* by the company.

There are two things complained of—one, that the company are going to raise debentures for purposes illegitimate; the other is, that they are about to establish what is called a railway instead of the existing tramway. Now let us look at what the objects of the company are. The objects of the company are stated in the memorandum of association to be to have a railway and tramway within certain definite points. Then it proceeds to say: "Unless and until the company shall increase their original capital, the undertaking of the company shall be confined to a railway and tramway from *Buenos Ayres* to *San Fernando*, authorized by the Government concession of the 25th of February, 1862, and to the further extension of that railway to the River *Tigre*." I apprehend that it is perfectly clear that what is intended is, that the company shall not undertake works of a totally different character; that is to say, a railway more extensive, going to different points, or the like, but they shall be contented with this railway and tramway within these definite termini. To say that the condition that £250,000 is to be raised before anything is done with reference to their exceeding these works, is a provision which is to extend to preventing their making a railway or tramway between the points in question more useful by turning the tramway into a railway, or *vice versâ*, seems to me a perfectly idle controversy.

Then comes the only other question arising as to the proper application of the money. The bill sets out a report which has been made to the shareholders, by which it appears that the balance in hand of net profits amounted to £32,681 3*s.* 2*d.* The charge for interest upon the company's loan capital, &c., for 1869, and for some old claims of previous years, was £5838 6*s.* 2*d.*, leaving, after lending to the capital account £10,350 17*s.* 4*d.* for special expenditure, £16,491 19*s.* 8*d.* available for distribution. Then they proceed to say that they propose paying that over to the guaranteed shareholders. Those guaranteed shareholders had a right to carry on their surplus debt, beyond what they were paid *de anno in annum*, to following years, the consequence of which was that arrears of debt had accrued upon the income due to the guaranteed preference shareholders, and therefore the company intended to reduce that debt, which then amounted to about £25,000, by raising money under their borrowing powers. Then they say, "When we have raised the money under our borrowing powers" (and they are keeping considerably within the limit of their borrowing powers) "we shall apply that capital so to be raised in paying off £10,000 of this guaranteed debt, because we find that we have really to our credit in respect of capital £10,000 as against this arrear of interest, this £10,000 having been taken from revenue account formerly, and applied to purposes which were really and in fact capital purposes." That is what they state. The only averment in the bill with respect to the illegality of this proceeding is the following, and there is nothing stronger in the affidavit: "The effect of the proposal contained in the report is, that sums which have been paid out of revenue, and ascribed in the accounts of the company to revenue, are now to be treated as payments on account of capital account, and considered as having been borrowed for the purpose of capital from the revenue, so as to create an apparent or fictitious fund for the payment of shareholders." The only words that would at all point to anything wrong are the words "apparent or fictitious." But the substance of the averment does not point to anything of the kind, because the substance is only this, that some sums which formerly were carried to revenue account are now going to be treated as capital. There is no averment that they ought not to be so treated. We are left to find out whether it was wrong or not as well as we can by looking into the accounts; and from them it appears that, as to certain locomotive engines and certain other stock, they were formerly charged to revenue; and it seems, as far as I can collect—for the accounts are not very clear—that these are now to be carried to capital. No doubt many great frauds have been practised by companies both upon themselves and sometimes, unfortunately, upon the public, by carrying to capital account things which ought to go to revenue account, and thereby leaving an imaginary profit, which is not a profit at all. But the bill avers nothing of this kind distinctly and definitely, and the affidavit does not go beyond it. The affidavit verifies a quantity of reports, out of which I am to pick the items as I best may, to ascertain whether they should or should not have been charged to capital or revenue account. If I saw anything grossly extravagant or fraudulent in them—such as the working expenses of the year, or the wages of the men, carried to capital account, in order to make things look pleasant, as it is called—I should have to pause, and consider how it might be proper for this Court to deal with transactions of that kind. But the only thing pointed out to me is the purchase of new locomotives. I do not know exactly on what principle railway companies proceed in their accounts with respect to their locomotives, whether the whole value should be credited, or whether a deduction should be made annually for the stock wearing out, or whether the value of the stock should be taken, which would be the more regular course, at the end of every year. But, certainly, that new rolling stock is in a sense capital as long as it lasts, and that its value on each succeeding stock-taking is capital, there is no doubt whatsoever. Then, why am I to assume that in doing this the directors are acting fraudulently? In the answer it is sworn that things which were properly capital had been paid for out of revenue. If that is the case, I have no hesitation in saying that the circumstance that they had been paying what ought to be charged to capital out of revenue does not prevent their right or their duty to the persons who are looking for their payment out of revenue, to credit back to revenue those things which have been carried for the time to capital account. Mr. *Dickinson* started a very curious theory, which, I apprehend, never found its way into any mercantile arrangement—that there never can be any available income, or any profit, as long as there is any debt remaining unpaid. If that be so, I suppose there is hardly a railway company in the kingdom which could pay any dividends at all to their shareholders. I fancy there are very few indeed which have not debentures out in some shape or other; and if all those are to be paid before a single sixpence could be paid in dividend, of course the companies would be in a very different position from what they suppose themselves to be in. The whole scheme of railway arrangements, as I have understood them, has always been this, that the companies are authorized to raise part of their capital by shares, and to raise further capital by means of borrowing to the amount of one-third of the whole share capital. They expend that money in executing the works, and the works having been executed, the capital of the company remains in the shape of the station-houses, the permanent way, the warehouses, and everything else which requires expenditure of capital.

L. C.
1870
Mills
v.
Northern
Railway of
Buenos Ayres
Company.

The shareholders, especially those who are guaranteed preference shareholders, are not to be told that all these things are to be paid for before they are to have any dividend out of the income.

Therefore the whole of the averment, as I read it here, is really this, that the directors have said in their report that they are going to carry back to revenue what they borrowed from it for the purposes of capital, and when they have carried that back to revenue then they are going to make a dividend. I do not see anything *ultrà vires* in what is either there alleged or suggested. Therefore, even if we assume the Plaintiffs to be shareholders, as to which more argument and more investigation might be required if it were necessary to determine that question, the Plaintiffs have shewn nothing *ultrà vires*; and, counting them as creditors, the case is utterly unfounded as regards both principle and authority. I think, therefore, that the motion for an injunction ought to have been refused with costs; and I make an order to that effect.

Solicitors for the Plaintiffs: Messrs. *Sole, Turner, & Turner*.

Solicitors for the Defendants: Messrs. *Ashurst, Morris, & Co.*

L. C.
1870
July 22, 29.

Por 644
6 Ch 369, 370, -3
— 378 n [illegible]
5 Ch D. 260

In re ANCHOR ASSURANCE COMPANY.

Insurance Company—Amalgamation—Policy—Novation.

A life assurance policy with profits was obtained from the *Anchor Company*; the *Anchor Company* afterwards transferred their business to the *Bank of London Association* under terms which appeared to keep the companies separate; and the *Association* was soon afterwards amalgamated with the *Albert Company*. Notices of these changes were given to the policy-holders, and the first receipt for a premium paid after the amalgamation with the *Albert Company* was in a special form; the subsequent receipts were merely receipts by the *Albert Company*, with the words "*Anchor Company*" on them. Three years after the amalgamation a bonus was declared by the *Albert Company*, and a sum of money was received as bonus by the policy-holder:—

Held, that, under the circumstances, there had been a novation of contract with the *Albert Company*, and that the representatives of the policy-holder could not obtain an order to wind up the *Anchor Company*.

Order of *James*, V.C., discharged.

THIS was a Petition by the executrix of *Samuel Heron*, praying that the *Anchor Assurance Company* might be wound up by the Court.

The *Anchor Assurance Company* was established in 1849, and the deed of settlement contained a provision that it should be lawful for any extraordinary general meeting of the *Company* to authorize the consolidation or amalgamation of the business of the *Company* with any assurance company or similar company, and provisions were also made for the dissolution of the *Company.*

Samuel Heron, in 1855, effected an assurance in the *Company* for £618, with participation of profits. The policy was in the usual form, and contained the usual condition that only the property of the *Company* should be liable; and it was effected through one *Ferraby*, an agent for the *Company.*

The *Anchor Company* carried on business at an office in *Cheapside* until 1857, in which year an agreement was made between the *Anchor Company* and the directors of the *Bank of London and National Provincial Assurance Association*, whereby it was agreed that the business of the *Company* should be amalgamated with that of the *Association*, and that the amalgamated business should be carried on by the *Association;* that the engagements of the *Company* should be taken by the *Association*, who would indemnify the *Company* against liability thereon; that the money and property of the *Company* should become the property of the *Association*, and that all claims on the *Company* should be met and satisfied by the *Association;* arrangements were made for giving shares in the *Association* to the shareholders in the *Company;* and the *Company* agreed to use their best endeavours to procure the holders of policies to accept in exchange or in renewal policies of the *Association;* and in all cases in which the policies of the *Company* remained in force the *Association* would indemnify the *Company* against claims in respect thereof.

The agreement was carried into effect so far as the *Company* and the *Association* were concerned, and the *Company* ceased to have any office or place of business. In November, 1857, a circular was sent to *Ferraby* stating that the directors of the *Anchor Company* had agreed to amalgamate and consolidate the business of the two companies; that the liabilities would be subdivided with about 1200 additional shareholders; that the cost of management of the two companies would be considerably reduced; that as the united business would be conducted on the very convenient premises of the *Association*, it was agreed to drop the name of the *Anchor*, and that the consolidated business of the two companies would be carried on in the name of the *Bank of London and National Provincial Assurance Association*; that with the simple object of giving the insurers and agents as little trouble as possible renewal receipts would be issued in the usual manner as they became payable, but in all cases where the insured preferred new policies they would be cheerfully and gratuitously supplied, although in each case their interests were equally safe. This notice was communicated by *Ferraby* to *Heron*.

In November, 1858, an agreement was made between the *Association* and the *Albert Life Assurance Company* for the amalgamation of the business of the *Association* with the business of the *Albert Company*, and for the transfer of the assets. Notice of this arrangement was sent to *Ferraby*, and he was informed that the business would in future be carried on at the office of the *Albert Company* in *Waterloo Place, Pall Mall*; that the agreement provided that the policy-holders of the *Association* should be entitled to participate in the bonus of the *Albert Company* becoming due at the close of the year; that a renewal premium receipt had been specially prepared, and would be adopted, by which the *Albert Company* would cover the risk under the existing policies of the *Association*, but whenever required such policies might be exchanged for those of the *Albert Company*.

Ferraby was agent for the *Association*, and for the *Albert Company*, and communicated the particulars of these notices to the policy-holders. He continued to be agent for the *Albert Company*, and received and paid the premiums on *Heron's* policy.

For twelve months after the amalgamation between the *Association* and the *Albert Company*, the *Albert Company* gave special forms of receipts for premiums on policies in the *Anchor Company*, in which the policy was stated to have been in the *Anchor*, and that the liabilities on the policy had been taken by the *Albert Company*; afterwards the receipts were in the following form:—

L. C.
1870
In re
ANCHOR ASSURANCE COMPANY.

Albert and Medical Life Assurance Company,
7, Waterloo Place, Pall Mall, London,
Established 1838.

Anchor Assurance Co.
Life receipt on Policy No. 2458. Sum assured £624. Life. *Samuel Heron.* Premium £ ; interest £ , for 12 months, from 5 June.
H. Ferraby, Agent.

Received this day of July, the premium for the renewal of policy mentioned in the margin hereof, the amount of which premium, and the period for which it is received, are also mentioned in the margin.

H. Ferraby, Agent.

In June, 1863, a circular was sent to the policy-holders, headed "*Albert, Medical, and Family Endowment Life Assurance Company,*" announcing that a bonus or allotment of the surplus profits of the *Albert Company* had been made to the assured, which might, at the option of the policy-holders, be taken as either an addition to the sum insured, a present payment, or a reduction of the future premiums. It appeared that *Heron* preferred to receive the present payment, and did actually receive £4 5*s.* 8*d.*, which was paid to him by a cheque from the *Albert Company.*

Heron continued to pay the premiums through *Ferraby*, for which receipts were given for the *Albert Company* in the form last above-mentioned.

In April, 1869, *Heron* died.

In September, 1869, an order was made for winding up the *Albert Company.*

The executrix of *Heron*, in February, 1870, presented the Petition in this case, stating that she had applied to the directors of the *Anchor Company* for payment of the sum due on the policy; that the *Anchor Company* had no place of business; that the assets of the *Albert Company* were not sufficient to meet the liabilities; and praying that an order might be made for winding up the *Anchor Company.*

The Vice-Chancellor *James* made an order accordingly (1), and

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(1) 1870. March 21.

SIR W. M. JAMES, V.C. :—

I am of opinion that the Petitioner is entitled to an order for winding up the *Anchor Assurance Company.* In the first place it is to be borne in mind that I am dealing with the *Anchor Company* only, and not with the *Bank of London and National Provincial Assurance Association.*

Then it appears to me that the first circular which was issued, and which I the *Albert Company*, by its official liquidator, the *Bank of London Association*, by its liquidator, and the *Anchor Assurance Company* appealed.

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must take to have been communicated to Mr. *Heron*, is framed carefully to exclude the idea of *novatio*. There is no reference to any transfer of the policy of assurance; there is no reference to any substitution of one body for another; the whole is based upon an amalgamation and consolidation of the business of the two companies, which, although amalgamated and consolidated, are represented as still about to exist:—[His Honour then commented on the terms of the agreement and of the circular.]

The *Anchor Company*, in point of law, continued to exist, and continues now to exist, never having taken any step whatever to effect a dissolution. It is therefore simply the business of the two companies that has been carried on together for the purpose of economy. It certainly appears to me that the *Anchor* still remains liable to the representative of Mr. *Heron;* there was no transfer of the business to any new company; no new company, in fact, ever existed, and he never supposed that he was going to be transferred to any new company. That being, in my opinion, his position under the first amalgamation, he remained a creditor of the *Anchor*, the *Anchor* remains liable to him; and I am of opinion that what took place afterwards—if what took place afterwards would have led to a different conclusion as between the *Bank of London* and the *Anchor*—could not affect his position as between him and the *Anchor*. The *Anchor* were no parties to it, and all that was effected by that, or expressed to be effected, was a transfer of the liability of the *Bank of London* to the *Albert*. If he had no claim against the *Bank of London*, or if the *Bank of London* was only in the nature of a surety for the *Anchor*, or had only taken upon themselves as between them and the *Anchor* the liability on this policy, of course their liability may be at an end; but it cannot, in my judgment, affect the liability of the *Anchor* itself to their original policy-holders.

Then it is said that this claim is affected by the receipt of a bonus, which must have indicated the acceptance of a right to participate in the profits of the *Albert*. It is a mere question of fact as to the intention of the policy-holder, and it is not immaterial with regard to that to notice that he was himself entitled to a share of the profits of the *Anchor* business, and that he was afterwards told that a bonus would be given for the first year of the union between the *Bank of London* and the *Albert*, and he might therefore fairly assume that he would, in his character of a policy-holder in the *Anchor*, have been entitled to receive the bonus that was offered to him. It is said that the profit was the profit of the whole concern. No doubt it was, for I do not see how it was possible to divide the profits between the two concerns. It is not likely that they would be all put upon an equality, and, as between the different businesses, no other rule could easily be adopted than to consider the whole equally profitable, and give to every person who had a share in the one his share out of the common fund which had been contributed from the two or more sources. Under these circumstances I am of opinion that this case is not governed by my decision, affirmed as it is by the Lord Justice, in *In re Times Life Assurance and Guarantee Company* (Law Rep. 5 Ch. 381), Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Rodwell*, for the Appellants, contended that this case was very strong, inasmuch as the policy-holder had received a bonus which he must have known came from the *Albert*, and not from the *Anchor*. Whether the *Anchor* and the *Bank of London* became one company or not, the *Anchor* had become one company with the *Albert*, and the policy-holder had accepted the *Albert* instead of the *Anchor*. The case was stronger than that of *In re Times Life Assurance and Guarantee Company* (1). The onus was on the Petitioner to shew that the premiums were paid, and unless she admitted that the *Anchor* was merged in the *Albert* she could not say that the premiums had been paid to the *Anchor*.

Mr. *Fry*, Q.C., and Mr. *Langworthy*, for the Petitioner:—

The *Anchor* and the *Bank of London* were carefully kept separate, though the two businesses were to be carried on together, and, so far as the *Bank of London* is concerned, there is no pretence for saying that there was a novation of contract. There can be no novation where the creditor does not agree, and there is no proof that he did. In the agreement there were express provisions for those who would take new policies, and *Heron* did not. In fact, the *Bank of London* could not have taken the liabilities, as it would have made itself liable without limit. In the early Roman law the evidence of novation occasioned great difficulties; and the law was changed by *Justinian*, who enacted that unless the *animus novandi* was shewn, both contracts co-existed: *Just.* Inst. (2). The transaction must be trilateral, and there is no evidence of *Heron's* agreement. The *Anchor Company* has never been dissolved, and must be taken still to exist, which makes the case different from that of *In re Times Life Assurance and Guarantee Company*. Wha was *Heron* to do, and at what time could he take action? He was bound to pay his premiums where he was directed to pay them, and he must have assumed that the *Anchor* was still in existence.

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that there was no *novatio* there as between the policy-holders in the *Anchor* and the *Bank of London*; and there having been no *novatio* in that instance, nothing that afterwards occurred between the *Bank of London* and the *Albert* could affect the liabilities either of the *Anchor Company* or the policy-holders.

(1) Law Rep. 5 Ch. 381.

(2) Inst. 3, tit. 29; Dig. 46, tit. 2.

L. C.
1870
In re ANCHOR ASSURANCE COMPANY.

LORD HATHERLEY, L.C.:—

I have no doubt as to this case, and I cannot distinguish it from the case of *In re Times Life Assurance and Guarantee Company* (1), entirely concurring with the decision of the Lord Justice *Giffard* in that case.

Mr. *Fry* has contended that the arrangements between the companies are different in this case, because the *Times Company* was dissolved, and its assets were handed over to the *Albert Company*, whilst in this case the *Anchor* was to be kept alive, though the business was handed over. But it is not very important to consider whether this was done in one way or in the other, for the company could not be dissolved without paying the existing creditors, and for that purpose must be considered as existing. If the receiving company had not power to make such an arrangement there might be a difference, but that question has not been raised here, and I must assume that the *Bank of London* had power to make the agreement.

In all these cases we must consider how far the Court can infer what is called a novation of the debt, where the debt is not payable to the creditor by the debtor, but is only payable out of the assets of the company, and, therefore, the step to be taken in changing the contract is wider than where there is the simple relation of debtor and creditor; in other words, more evidence will be required to shew that a new contract has been made.

A policy of insurance is not exactly a new contract every year, but is a contract made once for all with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end. Now the *Bank of London Association* agreed with the *Anchor Company* that the *Association* would induce the policy-holders of the *Anchor* to accept new policies, and if this did not succeed would indemnify the *Anchor Company* against liability. And, considering that the assets would all be handed over to the *Bank of London Association*, it is not likely that a policy-holder would refuse to accept the liability of the new company, but he might do so, and the question is, whether Mr. *Heron* has accepted the new company, and it appears to me that he has clearly and distinctly done so. A circular was sent to the agent *Ferraby*, who continued his agency for the *Bank of London Association*, and though we have no evidence of anything done by *Heron* in the year before the amalgamation with the *Albert*, still he had notice of the transaction between the *Anchor* and the *Bank of London.* [His Lordship then read and commented on the first circular and on the evidence.] Then he received another notice, informing him that the *Bank of London Association* meant to hand over their business to the *Albert*, and telling the policy-holders that they were entitled to a bonus, and that the *Albert* would give receipts for premiums. [His Lordship then commented on the notice.] *Heron* took receipts accordingly, which say nothing about any covering or guarantee, but the earlier of them say that the *Albert* has taken the business, and would be liable for the amounts insured on condition that the premiums were paid. *Heron* performs that condition by paying them the premiums; and, moreover, he receives a bonus from the company, which he could only be entitled to through the medium of the intermediate company, the *Bank of London*, the circular of which informed him that their policy-holders would be entitled to receive the bonus. If any connection were wanted between the intermediate company and the *Albert*, the connection is plainly made out. A letter is addressed to their agent, which is communicated by their agent to Mr. *Heron*, from which he derives information that he is a policy-holder in the *Bank of London*, and will be able to claim a bonus from the *Albert*, and he has intimation from the *Albert* that they have taken upon themselves the liabilities of the *Anchor*. The matter is made perfectly clear by his claiming and receiving the bonus, and giving a receipt for it as being a bonus distinctly of the *Albert Life Assurance Company*. The name of the *Anchor Company* being found on the receipt was merely, as Lord Justice *Giffard* remarked in the *Times*' case, identifying the premium, and shewing in respect of which policy it was paid. How can Mr. *Heron* now say that he will receive a benefit out of the moneys of the *Albert*, without being held to be bound to the whole arrangement? He was receiving profits from the *Albert*, which he had no more right to than any of us sitting here unless through the medium of his *Anchor* policy, which was handed over to the *Albert*, the *Albert* having become liable on it, and having in that respect received the premiums, so that the conditions of the original contract are from thenceforth performed by him towards the *Albert*, and not towards the *Anchor*.

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(1) Law Rep. 5 Ch. 381.

The thing appears to me plain beyond all possibility of dispute. I will not enter into some of the peculiar arrangements of the Roman law which have been mentioned in this case. There are cases which might arise, and which arise more frequently in Bankruptcy, as to whether a creditor has accepted a new firm as his debtor, instead of the previously existing firm, with or without additional members. I do not think it necessary to enter into the nice question whether a person might claim upon both. I think that Mr. *Heron* has distinctly availed himself of the alternative offered to him; he has become a policy-holder in the *Albert;* his whole claim is on the *Albert*, and therefore I must disregard his claim upon the *Anchor*. The Petition must be dismissed with costs; but there will, of course, be no costs of the appeal.

Solicitor for the Petitioner: Mr. *Cleobury*.

Solicitors for the Appellants: Messrs. *Paine & Layton;* Messrs. *Lewis, Munns, & Co.*

L. C.
1870
July 22;
Aug. 2.

W[illegible]
16 Ch D 315.

In re MANCHESTER AND LONDON LIFE ASSURANCE AND LOAN ASSOCIATION.

Insurance Company—Amalgamation—Novation.

In 1862 the business and assets of the *Manchester Association* were transferred to the *Western Society*, which was afterwards incorporated with the *Albert Company*. A policy-holder in the *Manchester Association* paid his premiums at the different offices and took receipts, which mentioned the successive changes, the last receipts being in the name of the *Albert Company* alone:—

Held, that the receipts did not disclose enough to fix the policy-holder with knowledge of what had taken place between the companies, and that his executors were entitled to obtain a winding-up order against the *Manchester Association*.

Order of *James*, V.C., affirmed.

THE Petitioners in this case were the executors of one *Bartlett*, who had, in 1860, effected a policy on his own life in the *Manchester and London Life Assurance and Loan Association*, and they asked for an order to wind up that *Association*. In 1862 the business and assets of the *Association* were transferred to the *Western Life Assurance Society*, and that *Society* was in 1865 incorporated with the *Albert Life Assurance Company*. The only evidence to shew that *Bartlett* had accepted the *Albert Company*, and had released the *Manchester Association*, was the receipts for the successive premiums. These receipts are set out in the report in the Court below (1), where the facts are more fully stated.

The Vice-Chancellor *James* made, upon this Petition, an order to wind up the *Manchester Association* (2), and the Association appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Higgins*, for the Appellants:—

In this case all reference to the old company had been dropped, and the payments were undoubtedly made to the *Albert*, which, no doubt, made a good contract with the *Albert*, but not with the *Manchester Association*. The claimants must shew that the premiums were paid to the *Manchester Association*, or else the policy has dropped, and they have no claim; but all they shew is that the *Albert* received the premiums. This makes the distinction between this case and that of the *Family Endowment Society* (3); for here the claimants have to shew that *Bartlett* performed his part of the contract. There may be twenty amalgamations, and it is for the claimants to prove that the right to receive the money and to continue the liability was preserved.

Mr. *Morgan*, Q.C., and Mr. *A. Bailey*, for the Petitioners:—

Mr. *Bartlett* continued to pay the premiums at the only office where he could pay them, and could not be bound to know of the internal changes of the companies. He paid where he was told to pay, and took the receipt as they chose to give it. Supposing that he had declined to pay the *Albert?* Would not his policy have dropped? It is the duty of the Appellants to shew where he was wrong.

Mr. *Cracknall*, and Mr. *Everitt*, for other parties.

(1) Law Rep. 9 Eq. 645.

(2) Law Rep. 9 Eq. 643.

(3) Law Rep. 5 Ch. 118.

Aug. 2. LORD HATHERLEY, L.C.:—

This case presents a point of very considerable nicety. With regard to the case of the *Family Endowment Society* (1), I have not, and could not have, any doubt that the decision to which the Lord Justice *Giffard* and myself came was based upon sound principles. But this case is of a different character, the contract being a contract for assurance, and there being annual premiums necessary to be paid as a part of that original contract of assurance. It is not a new contract from year to year, but it is a contract of assurance by the *Manchester Company* with Mr. *Bartlett* that, he making payments to them *de anno in annum*, they will, on his death, make a certain payment to his executors out of the assurance fund of the society.

It is necessary for the executors, in order to be entitled to the benefit of this original contract, to establish that he has made the payments which he was bound to make before the executors could claim any money on any policy.

The course of proceeding here was what I may call an internal course. Mr. *Bartlett* had, as far as the evidence goes, no information beyond what the receipt discloses. Now, I hold that the receipt of 1862 gave him no intimation at all of there being a new directorship which was to enter into engagements with him. And as to the receipts for 1863 and 1864, I cannot hold that he was in any way in error in taking a receipt from people who represented themselves as united with the others, or that he was necessarily bound thereby to find out what the nature of the union was, or in taking a receipt on which it is stated that the society is incorporated with the *Albert Life Assurance Company*. The next receipt is somewhat different, being headed "*Albert Life Assurance Company, 7, Waterloo Place, Pall Mall, London.*" But the receipts always refer to the old policy; and the question arises, how far a person taking a series of receipts of this kind, and, up to that very receipt in question, always having had the *Manchester Association* mentioned, must be taken to be fixed with the knowledge of the transaction which had taken place between the companies internally. Of course, if he knew all that had been done, there would have been an acceptance on his part of the new company, and that company would become his debtor instead of the old one; and, taking the receipt from them, he could only maintain his claim by shewing that he had taken a receipt from persons who were competent and proper to give him that receipt.

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(1) Law Rep. 5 Ch. 118.

I confess I think it would be too strong to hold that, simply on the ground of these receipts, he is to be taken to have made a novation of his contract; and the question is, whether a person having or not having a knowledge of mercantile matters is to be held to have been so acquainted with all the internal arrangements that took place with reference to what is called an amalgamation of the companies—the companies being incorporated with one another—that he can no longer safely pay the company with whom he holds the engagement, and who are bound to give him a receipt for his payments; that, in fact, he can no longer conceive himself safely to be a creditor of that company with whom he entered into the original engagement, because they tell him that, by a process of some kind or other, they are united with and are incorporated with another society. It was possible that all the accounts were kept separate—separate one from another—and he might be able to take a receipt from one or the other, and one company might regard the other as agents for giving the receipt.

He is led on to that by degrees. When he is paying at the old office, 77, *King Street, Manchester*, he has a receipt which tells him that they are incorporated with the *Albert* in *Waterloo Place, London;* and his next receipt is from the *Albert*, *Waterloo Place, London.* He may have had a letter sent to him, but he is dead, and we can get no information from him. It does not appear to me that there is so much disclosed that I can impute to him the knowledge which I was pressed so strongly to impute. Common sense requires that there should be such a transfer as should come to his knowledge. He knew nothing of the company; so far as any evidence goes, he knew nothing of the responsibility of the shareholders in the *Albert*, as contrasted with those immediately engaged in the *Manchester*, which should lead him to let loose his hold upon the *Manchester*, simply because he paid his premium and took a receipt from the *Albert*. It might, possibly, make a difference in the case if we had found him, without justification, paying to the *Albert* the premiums due to the *Manchester;* but

L. C.
1870
In re MANCHESTER AND LONDON LIFE ASSURANCE AND LOAN ASSOCIATION.

when the *Manchester* choose to inform him that they are incorporated with the *Albert*, and after that the *Albert* send him the receipt, if you find as the real nature of the transaction that the *Albert* were authorized to give the receipt, you are not justified in saying that he ought to read it as being an authority to the *Albert* to give receipts as for themselves. He was not compellable to inquire into it; although, if the matter had been otherwise, the *Albert* might have been liable to pay him.

I cannot hold, therefore, that the order is wrong; and I must affirm the order of the Vice-Chancellor, and the appeal will be dismissed with costs (1).

Solicitors: Messrs. *Drew & Wilkinson;* Messrs. *Lewis, Munns, & Co.;* Messrs. *Underwood & Colman.*

L. C. and L. J. G.
1870
Jan. 25.

In re NORTHERN ASSAM TEA COMPANY.

Appointment of Official Liquidator—Appeal—Costs.

The Petitioner in a winding-up is not as a matter of course entitled to appoint the official liquidator.

Where an official liquidator who is personally qualified for the office has been appointed by the Court below, his appointment will not be disturbed by the Court of Appeal.

Order of the Master of the Rolls affirmed.

ON the 19th of July, 1869, the *Northern Assam Tea Company, Limited*, was ordered to be wound up, and, after a contest on the subject, Mr. *Gibbons* was appointed by Sir *W. M. James*, the Vacation Judge, to be provisional official liquidator of the company.

On the 7th of December, 1869, the Master of the Rolls discharged Mr. *Gibbons* from his office, and appointed Mr. *Barrow* official liquidator of the company, on the ground that Mr. *Thompson*, who proposed Mr. *Barrow*, was the person who obtained the winding-up order. Mr. *Gibbons* was supported by creditors claiming £38,500 (of whom, however, one claiming £30,700 for unpaid

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(1) See *In re Anchor Assurance Company*, *ante*, p. 632.

L. C.
and L. J. G
1870
In re
NORTHERN
ASSAM TEA CO.

purchase-money had been settled with for £1000), and by shareholders holding 3370 shares. Mr. *Barrow* was supported by creditors for £10,200, and shareholders holding 668 shares. The shares had all been called up, and there would not be enough to pay the creditors. Evidence on both sides was entered into, and witnesses had been examined, but it was not disputed that each of the claimants was qualified for the office.

Mr. *F. T. Galsworthy*, a contributory to the company, now moved to discharge the order of the Master of the Rolls.

Sir *Roundell Palmer*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Hastings*, for the Appellant :—

This case has established an improper rule as to the appointment of the official liquidator, for it cannot be right that the Petitioner should always have the appointment. There is no controversy as to the fitness of the candidates, for each is well qualified. If this had been a mere exercise of discretion by the Master of the Rolls, of course we should not have appealed, but we appeal against his decision as to the rule. Sect. 92 of the *Companies Act*, 1862, says that the Court is to appoint, but if the rule which has been laid down by the Master of the Rolls and the Vice-Chancellor *Malins* is to be adhered to, it will be the Petitioner who appoints. It may happen that the Petitioner has, in fact, no interest whatever in the matter, as in this case. Here Mr. *Gibbons* is supported by a large number of creditors and shareholders, and their wishes ought to prevail.

Mr. *Jessel*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Higgins*, for the Respondent, contended that, by laying down a rule, these expensive and useless contests would be avoided; and the only rule was that, as in the case of a receiver, the person who had the carriage of the proceeding ought to have the appointment. At all events, Mr. *Barrow* had been appointed, and the Court ought not to interfere: *In re International Contract Company* (1); *In re London, Bombay, and Mediterranean Bank* (2).

Mr. *Roxburgh*, in reply.

(1) Law Rep. 1 Ch. 523 12 Jur NS 591 (2) Law Rep. 1 Ch. 525. 12 Jur NS 591.

LORD HATHERLEY, L.C.:—

It is very unfortunate that these cases should be brought before the Court, and therefore both the Master of the Rolls and the Vice-Chancellor *Malins* have, as I understand, with the view of stopping these ruinous and discreditable contests, in which the shareholders have no interest whatever, laid down a rule that, *cæteris paribus*, a preference will be given to the person who is supported by the Petitioner who has charge of the winding-up order, without regard to the other circumstances of the case, and without considering whether the shareholders or the creditors have the greater interest.

Now, if that were the fixed rule, it would add to the temptation which exists to obtain a winding-up order for the creation of costs. But though that ought not to be the rule, it is very difficult to lay down any other, and I should be very sorry to lay down any hard and fast rule. One rule, however, was laid down and acted upon very efficaciously by the Lord Justice *Giffard*, when Vice-Chancellor, in refusing costs to every person, except to the person who carried the appointment, and allowing him ordinary costs only.

Now, in this case Mr. *Galsworthy* is a shareholder, and it is manifest that the shareholders have no interest whatever in this winding-up, as there will be a large deficiency. Then, as to the creditors, there is some controversy, but they seem to preponderate on the side of Mr. *Barrow*. I do not, however, weigh them very accurately, nor do I say that if the case had come before me I should have substituted Mr. *Barrow* for Mr. *Gibbons*, who was the temporary liquidator, but Mr. *Barrow* has given security, and has entered on his duties, and is equally qualified with Mr. *Gibbons*. The Master of the Rolls has, perhaps, not exercised his discretion to the full, and the rule laid down by him is not sufficient to guide the Court; yet, now that the matter has been investigated, I see no reason to differ from him. If I thought it a matter of discretion I should, of course, not interfere; but having investigated the matter, and not finding any reason for displacing Mr. *Barrow*, I must refuse the appeal motion, and with costs.

L. C. and L. J. G.

1870

In re NORTHERN ASSAM TEA CO.

SIR G. M. GIFFARD, L.J.:—

I quite agree that you can lay down no hard and fast rules in cases of this description, and I am certain that we ought not to lay down any such rule as appears to have been laid down, viz., that the nominee of the Petitioner should have a preference. I think that is very undesirable, because, to my mind, it would be throwing out an additional bait for trafficking in Petitions of this description, of which, unfortunately, there is at present enough. I think it would be far better to lay down as a rule, although I do not say a universal rule, that no one should have the costs of the application for the appointment of official liquidator but he who applies and succeeds, and then only the ordinary costs of an ordinary application. Three-fourths of these contests and applications are for costs; and I believe, if that rule were acted on, we should see but very few of them. I may add that the position of a Petitioner in a winding-up is very different from that of a Plaintiff in a suit. A Plaintiff in a suit, although a receiver may be appointed, still remains *dominus litis*, and has the carriage of everything; whereas, when an official liquidator is appointed, he becomes *dominus litis*, and the Petitioner is wholly displaced. There is, therefore, no analogy between the position of a Plaintiff (though it may be, and I have no doubt in many cases is, a very salutary rule that he should have the preference in the appointment of a receiver) and the position of a Petitioner in a winding-up.

With respect to the present case, I must say I think it is very wrong to examine or cross-examine witnesses on a contest of this kind, unless there is a case of fraud alleged. Be that as it may, Mr. *Barrow* has been appointed, and has given his security, and it would lead to very much additional expense if he were now displaced. Therefore, independently of the fact that the Master of the Rolls has to some extent exercised his discretion, that would be a reason why he should be retained and the appeal dismissed; but I must say, if Mr. *Galsworthy* had been an Appellant who had a real interest, I should have been very much disposed not to have refused his appeal with costs. Being of opinion, however, that he has no real interest whatever in the company or in this

L. C.
and L. J. G.
1870
In re
NORTHERN
ASSAM TEA CO.

question, and that it is neither more nor less than an official liquidator's application, I think it right to dismiss the appeal with costs.

Solicitors: Messrs. *Deane & Chubb;* Messrs. *Mercer & Mercer.*

L. C.
and L. J. G.
1870
June 7, 8.

20 Eq 110
512
~~6 Ch D. 519~~
20 Ch D 714

RICHARDSON *v.* SMITH.

Vendor and Purchaser—Specific Performance—Valuation.

By the contract for the sale of an estate it was agreed that the price should be £24,000, and it was further agreed, amongst other things, that certain furniture and other articles on the estate, the value of which were about £2000, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete.

Decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles.

Decree of *Stuart*, V.C., affirmed, with a variation.

IN the year 1868, after some correspondence, in which the vendor stated that certain furniture and articles in his house had been valued at £1684, and that he was disappointed, considering them to be worth more, a contract was entered into on the 30th of November, signed by *R. Smith,* the vendor, and *J. O. Richardson,* the purchaser, by which the vendor agreed to sell, and the purchaser to buy, the *Glanbrydan* estate, of about 489 acres, for £24,000. And it was further agreed that the purchaser should take all fixtures stated in Schedules 1 and 2 for £480; and that as regarded all articles of furniture and other property inside or outside the house, as specified in three books, numbered 1, 2, and 3, they should be re-valued by valuers to be mutually agreed upon, except certain articles which were to be reserved. And it was further agreed, that when such valuation had been made the purchaser bound himself to take things from book No. 1 to the extent of not less than one-half of the amount of the valuation; and the articles to be valued, as specified in books 2 and 3, were to be taken by the purchaser at such valuation; that when the amounts were ascertained the purchaser would pay the vendor by bills at four months from the 1st of January, 1869.

This contract appeared to have been prepared by the parties themselves without any solicitor. The vendor afterwards wished to have a more formal contract, and sent the draft of one to the purchaser containing provisions as to making out the title, to which the purchaser objected, and he stated that the existing contract was sufficient. Some correspondence ensued, the solicitors of the vendor stating that a formal contract was always contemplated; that the vendor could not make a strictly marketable title, and that it was absurd to suppose that the vendor would have subjected himself to the trouble and expense as to title which an open contract would expose him to. Further correspondence ensued, and the vendor named valuers; but as the purchaser declined to have a further contract, the nomination was withdrawn, and on the 16th of December, 1868, the solicitors of the vendor wrote to the solicitors of the purchaser stating that the alleged contract was imperfect in material particulars besides that relating to title, inasmuch as the price to be paid for the articles enumerated in books 1, 2, and 3, was unsettled, and remained for future agreement; and that until the mistake as to the nature of the title to be furnished was rectified, the vendor would decline to perfect the contract by the nomination of any valuer for the purpose of ascertaining the price of those articles. Further correspondence ensued, and ultimately the bill in this suit was filed by the purchaser against the vendor for specific performance.

The Vice-Chancellor *Stuart* made a decree for specific performance (1), and the Defendant appealed.

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(1) 1870. Jan. 24.

SIR JOHN STUART, V.C., said that the terms as to the contents of the house were obviously an adjunct to the agreement, and the Defendant had a perfect right to refuse them unless some further arrangement was made. But as soon as these terms were agreed on, no matter what the terms were, there was a clear acceptance of the agreement. After the agreement was signed the Defendant changed his mind, and on a pretext, founded on a misapprehension of some of the decided cases, he attempted to evade the specific performance of this contract. The case of *Milnes* v. *Gery* (14 Ves. 400), proceeded upon the principle that if there was a contract for a sale at a price to be determined upon by certain persons, this Court, unless the price be fixed in the manner determined upon, and be made part of the agreement, cannot perform the contract at all; or, as Sir *John Leach*, in the case

Sir *Roundell Palmer*, Q.C., Mr. *Greene*, Q.C., and Mr. *Phear*, for the Appellant:—

The subjects of the agreement in this case are indissoluble, and one part cannot be performed without the other. The furniture cannot be valued unless valuers are appointed, and therefore the agreement cannot be enforced. The agreement was deliberately entered into, and would not have been entered into otherwise. The effect of excluding this part of the agreement would be to make the

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of *Morse* v. *Merest* (6 Madd. 26), expressed it, that a man who agrees to sell at a price to be named by *A.*, *B.*, and *C.*, could not be compelled by a Court of Equity to sell at any other price. But the price of this estate was £24,000, which price was clearly agreed upon, and terms were arranged as to the contents of the house. That was enough to make the agreement one which this Court was bound to perform, and it was impossible to say that an agreement to take fixtures or furniture, or even plant, at a valuation to be made by certain persons, could prevent the Court from enforcing performance of the agreement. It was determined in the case of *Jackson* v. *Jackson* (1 Sm. & Giff. 184), that where the subject matter was a bleaching-field, and so important a matter as the plant and machinery of a bleaching-field was to be taken at a price fixed by certain persons to be agreed upon as referees, that circumstance was no reason for not decreeing performance of the agreement as to the land. And Lord *St. Leonards* states that it is no objection, where the price of the land is fixed, that the plant, machinery, and fixtures are to be taken at a valuation. Therefore, upon that principle, it would be impossible to say that any valid defence to this bill could be maintained. But the case of *Vickers* v. *Vickers* (Law Rep. 4 Eq. 529) having been cited as an authority to guide the Court in the decision of it, His Honour wished to observe that he considered it to be the law of this Court that if the price of that which was the subject-matter of the contract was to be fixed by referees to be named, and the referees were named, the Court would not permit one of the parties to annul the contract by withdrawing the name of his referee, unless upon some good reason. That was what occurred in the case of *Morse* v. *Merest*, and Lord *St. Leonards*, who had occasion to argue—not against the authority of *Morse* v. *Merest*, because he never disputed it—but to take a distinction between that case and the case of *Agar* v. *Macklew* (2 S. & S. 418), lays down the doctrine: "If the seller prevents the valuation from being made by referees named, he will not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract." In this case His Honour thought it necessary to mention the circumstance, although his decision did not rest upon it, that the Defendant who set up this pretext as a defence had named two referees, and now said that he was not bound by that, because the persons whom he named were not agreed to by the Plaintiff until after he, the Defendant, had changed his mind, and wished to be off the contract. The defence altogether failed, and the Plaintiff was entitled to his decree for specific performance, and to the costs of the suit.

L. C.
and L. J. G.
1870
RICHARDSON
v.
SMITH.

purchaser enter into a contract which he never intended to enter into. There is but one contract to enforce, and the Court cannot make another for the parties because the first has failed. No decree can be made for specific performance of this contract which does not involve the appointment of valuers by the parties. The Court cannot distinguish between the parts of the agreement, and the Court has never enforced agreements of this nature: *Sugden's* Vendors and Purchasers (1); *Morgan* v. *Milman* (2); *Darbey* v. *Whitaker* (3); *Vickers* v. *Vickers* (4). *Jackson* v. *Jackson* (5) is not reconcilable with the other cases. Either there is a contract to have the furniture valued, or else there is no contract at all, and on this point the law has long been fixed: *Wilks* v. *Davis* (6); *Milnes* v. *Gery* (7); *Morse* v. *Merest* (8). As to performance with compensation, there can be none where the price has not been fixed. If the difficulty was as to minor matters, perhaps the Court might enforce the contract in a different form; but the valuation of this furniture was an essential part of the agreement, and that part of the contract cannot be rejected.

THEIR LORDSHIPS expressed an opinion that there must be a decree for specific performance, and wished to hear the Respondents as to the form of the decree only.

Mr. *Dickinson*, Q.C., and Mr. *Dumergue*, for the Respondents, cited *Dinham* v. *Bradford* (9).

Mr. *Greene*, in reply.

LORD HATHERLEY, L.C.:—

In this case an attempt is made to push the doctrine of *Milnes* v. *Gery*, which has already been certainly carried quite far enough, to an extent which would be utterly unwarrantable, and which, if it were permitted, would induce vendors who are desirous of retaining the power of escaping from their contracts to introduce provisions for the valuation of some minor part of the subject matter of the contract in such a mode that they might at any time escape from the performance of the agreement as to the main subject of the contract simply by setting up an act of their own in wrong of the purchaser, and refusing to appoint a valuer. Take, for instance, the sale of a large estate such as this, on which there was a wood of two or three acres, with timber thought to be a proper subject of valuation, and suppose that a provision was introduced into the agreement for the sale of the whole estate that this timber should be valued by valuers appointed by the parties. Then could either the purchaser or the seller play fast and loose as long as he pleased with the agreement, and get off the bargain by not naming a valuer? Hitherto the doctrine of *Milnes* v. *Gery* (1) has not been applied to such a case as that, and it has rather been settled that with regard to that which is not absolutely essential to the enjoyment of the estate, and is but a small adjunct to the purchase, the Court may, if a good title cannot be made to the adjunct, direct an inquiry whether it is essential to the enjoyment of the whole. If it be, the contract cannot be enforced, and the parties will be left to their remedy at law. But if it be not, the Court will force on the purchaser the purchase of the estate, and will not let him off his purchase because there happens to be a defect in the title as to a few acres, or as to the quantity described, where it is small in proportion to the whole quantity agreed to be sold.

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(1) 14th Ed. pp. 328, 348.
(2) 3 D. M. & G. 24. 17 Jun 193.
(3) 4 Drew. 134.
(4) Law Rep. 4 Eq. 529.
(5) 1 Sm. & Giff. 184.
(6) 3 Mer. 507.
(7) 14 Ves. 400.
(8) 6 Madd. 26.
(9) Law Rep. 5 Ch. 519.

The circumstance of the defect being in the extent of land cannot make any difference in the principle. As to the two cases of *Jackson* v. *Jackson* (2) and *Darbey* v. *Whitaker* (3), they must be taken to stand each upon its own peculiar circumstances, and in all these cases the Court must exercise its discretion as to what is or is not an essential part of the contract. Care must be taken not to do injustice by forcing parties to perform a contract including anything essential which is not found within the four corners of the contract. Both those cases seemed to have involved the purchase of trade fixtures, as noticed by Lord *St. Leonards* in the last edition of his Vendors and Purchasers.

Then as regards the case before us, what can be more simple?

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(1) 14 Ves. 400.

(2) 1 Sm. & Giff. 184.

(3) 4 Drew. 134.

The subject of the agreement was certainly not the articles enumerated in the books numbered 1, 2, and 3, but was a large estate of many acres, the purchase-money being £24,000, and the value of these articles probably under £2000.

[His Lordship then commented on the correspondence, and on the agreement, and said that the agreement was sufficiently formal, and that the Plaintiff had always been ready to abide by it; but the Defendant refused to name valuers, and insisted that the agreement could not be enforced.] It would be monstrous to push the doctrine of *Milnes* v. *Gery* (1) to that extent, and we think the Plaintiff entitled to specific performance. The decree made does not, however, appear exactly to meet the case, and we shall vary the decree, and preface it by saying, that the Plaintiff offering to perform his part of the agreement, and the Defendant refusing either to name a valuer, or to have the value of the articles ascertained by the Court, and the Court being of opinion that the agreement, so far as it relates to the purchase of the estate for £24,000 and the fixtures for £483, ought to be specifically performed independently of the purchase of the other articles, decree specific performance as to the estate and fixtures with an inquiry as to title, and leave out all mention of the other articles. This variation will not, however, affect the costs, and the Defendant must pay the costs of the appeal.

SIR G. M. GIFFARD, L.J.:—

In this case the appeal was argued on behalf of the Appellant upon two grounds. It was first of all suggested that the agreement of the 30th of November, 1868, even if otherwise unobjectionable, was not conclusive, because it was the intention of the parties that there should be some reference to the solicitor to prepare a more formal agreement, in order that some additional terms might be introduced on the question of title. It was further argued that this case comes within the principle of *Milnes* v. *Gery*, because furniture and chattels were to be purchased at a price to be settled by valuers to be selected by the parties.

Now, as regards the first ground, in my opinion the agreement is perfectly conclusive, and it was never intended that this agree-

(1) 14 Ves. 400.

L. C.
and L. J. G.
1870
RICHARDSON
v.
SMITH.

ment should be put into the hands of a solicitor for the purpose of introducing any additional terms of any kind or description upon the question of title.

That being so, it remains to be seen whether this case comes within the principle of *Milnes* v. *Gery* (1). The case of *Darbey* v. *Whitaker* (2) must come within the same category as *Milnes* v. *Gery*, and that was so decided because public-house fixtures were a matter essential to the contract; and if, in point of fact, no title could have been made to those fixtures, they could not have been the subject matter of compensation. But in this case we have a large estate sold for £24,000, with fixtures amounting to about £480, and the property which was to be valued is worth about £2000.

Now, trying the case in another way, if this had been an agreement to sell the whole of this property for £26,000, and it turned out that this particular furniture, unknown to the parties, was settled as heir-looms, so that the vendor could make no title to it, I should have no hesitation in saying that the vendor, on the one hand, could have enforced specific performance, and that the purchaser, on the other hand, could have enforced specific performance, and the Court would have deducted from the £26,000 the value, whatever it might be, of this particular furniture to which no title could be made. Then, if that is so, it seems to me, on the same principle, that the case of *Milnes* v. *Gery* has no application, because, in point of fact, that part of the agreement is a minor and subsidiary part of the agreement, and not at all essential.

In this case the Defendant is plainly and clearly attempting to take advantage of his own wrong. He was made to pay the costs in the Court below—I think, most properly—and he ought also to pay the costs of this appeal.

Solicitors: Mr. *W. C. Smith*; Messrs. *Prior & Bigg*.

(1) 14 Ves. 400.

(2) ~~1~~4 Drew. 134.

BOURTON *v.* WILLIAMS.

L. C. and L. J. J.
1870
July 20.

Husband and Wife—Reduction into Possession—Mortgage—Stat. 7 *Geo.* 2, c. 20.

A husband brought an action in the names of himself and wife to recover £200 due on a mortgage made to his wife before her marriage. The mortgagor obtained an order in the action that on payment of the principal and interest into Court the action should be stayed, that a reconveyance should then be executed, and that on its execution the money should be paid out of Court. An arrangement was made that the wife should receive £100, and the husband the rest, and the mortgagor, on being informed by the Plaintiffs' attorney that the Plaintiffs had settled their differences on those terms, consented to the payment out of Court to the Plaintiffs' attorney. The money was accordingly paid out to the Plaintiffs' attorney; but he, claiming a lien on the £100 for some costs, offered the wife only £83, which she would not receive. The wife survived her husband, and died without having received any part of the money, and without having executed a reconveyance. A suit for foreclosure having been instituted by her executors and devisees:—

Held (reversing the decision of *Stuart*, V.C.) that, independently of the stat. 7 Geo. 2, c. 20, the mortgagor and his estate were discharged from the debt, inasmuch as the receipt of the attorney of the Plaintiffs in the action was a good discharge.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Stuart*, made on an equity plaint transferred from the County Court of *Oxfordshire.*

By indenture dated the 3rd of May, 1858, the Defendant, *James Williams*, mortgaged certain freehold and leasehold property to *Alice Matthews* to secure £200. In January, 1860, *Alice Matthews* married *James Carr*, and her marriage settlement did not include the £200. In March, 1860, they separated, and never afterwards lived together.

Soon after the separation *Carr* commenced an action in the names of himself and his wife in the Court of Exchequer against *Williams* to recover the mortgage-money. Mrs. *Carr* gave notice to *Williams* that the action was brought without her consent, that the £200 ought to have been included in her settlement, and that she would not join in a reconveyance. *Williams* thereupon applied in Chambers, and obtained from Baron *Channell* an order, dated the 30th of June, 1860, that on payment into Court by the Defendant on or before Tuesday then next (the 3rd of July) of £200, together with £6 12*s*., the interest due at the date of the order, and costs to be taxed and paid, all further proceedings should be stayed, and that the Plaintiffs and all necessary parties should thereupon execute a proper reconveyance, and that upon payment to the Plaintiffs or their attorney of such further sum as might then be due for interest on the principal sum, the Plaintiffs should deliver to the Defendant such reconveyance and the title-deeds, and that thereupon the £206 12*s*. should be paid out of Court to the Plaintiffs or their attorney, and that in case such reconveyance should not be so executed and delivered on or before the 6th day of the next term, the Plaintiffs or the Defendant might make such application as they might be advised to discharge or vary the order, or as to the payment out of Court of the principal and interest.

On the 3rd of July, 1860, the £206 12*s*. was paid into Court. The money paid into Court was advanced by Mr. *Holmes*, the attorney of *Williams*, on an understanding that he should have a transfer of the mortgage. Shortly afterwards the £206 12*s*. was paid out of Court to Mr. *Manière*, the attorney of the Plaintiffs, *Williams* consenting. *Williams* stated that he consented to this payment on the faith of the representations made to him by *Manière* that *Carr* and his wife had settled their differences, and had agreed that £100 should be paid to Mrs. *Carr*, and the rest to her husband. It appeared that *Manière*, after receiving the £206 12*s*., offered to Mrs. *Carr* £83, being the £100 less £17 for costs which he alleged to be due to him from her for preparing her settlement. She refused to receive anything less than £100. A transfer of the mortgage with the name of the transferee in blank had been executed by *Carr*; but as Mrs. *Carr* was not paid £100 she refused to execute it, and no reconveyance was ever made. *Manière* thereupon paid the £83 to Mr. *Holmes*, who undertook to hold it for Mrs. *Carr*. *Holmes* died in 1863, having kept the £83 to a separate account up to his death. His legal personal representative alleged that she had a lien for costs incurred in respect of it, an action having been unsuccessfully brought by *James Carr* to recover it.

James Carr died on the 6th of June, 1866, and Mrs. *Carr* in the following month, leaving a will by which she appointed the Plaintiffs her executors.

The Plaintiffs filed their plaint against *Williams* for foreclosure, and after the coming in of his answer amended their plaint by making *Julia Holmes*, the legal personal representative of *Holmes*, a Defendant. The proceedings having been transferred into Chancery, Vice-Chancellor *Stuart* made a decree for payment of £100, with interest from the death of *James Carr*, and in default for foreclosure (1).

Mr. *Bristowe*, Q.C., for the Appellants.

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the Plaintiffs, in support of the decree. They referred to *Ryland* v. *Smith* (2).

The nature of the arguments sufficiently appears from the report before the Vice-Chancellor.

LORD HATHERLEY, L.C.:—

The question whether the requisitions of the statute 7 Geo. 2, c. 20, have been strictly complied with does not really arise in this case. The mortgagor, being sued by the husband in the name of himself and wife (which was necessary, as the contract had been made with the wife before marriage), pays the money into Court, having obtained an order directing a reconveyance on the money being so paid in, and directing the money to be paid out to the Plaintiffs or their attorney on the delivery of the reconveyance to the Defendant. We find that subsequently the money was paid out to the attorney of the Plaintiffs in the action. I am of opinion that this was a good discharge, whether the statute applies or not.

We are asked to take a very narrow view of the statute:—[His Lordship here read sect. 1.] The order of Baron *Channell* does not direct payment into Court of the principal and interest on that day, which would have been a literal compliance with the statute, but three days later, and directs that the reconveyance is to be delivered to the mortgagor on payment of the additional interest for those three days, and the difficulty then arises that the payment into Court three days after the order of the principal and interest due at the date of the order could not be a discharge of the security. The Vice-Chancellor appears, however, to have attached

(1) Law Rep. 9 Eq. 297.

(2) 1 My. & Cr. 53.

L. C.
and L. J. J.
1870
BOURTON
v.
WILLIAMS.

more importance to another objection, that the statute goes on to say that the Judge may discharge the mortgagor from the debt, and that this order does not in terms discharge him. I do not, however, feel any difficulty on that score, for the statute says that the money paid in shall be deemed and taken to be in full satisfaction and discharge of the mortgage. But we need not decide any question on the statute; for, as I have said, I am of opinion that the payment of the money into Court, and its being taken out by the attorney of the Plaintiffs in the action, effected a good discharge. Suppose, instead of paying the money into Court, the Defendant in the action had paid it directly to the Plaintiffs' attorney, that would have been a payment to the creditor, and there would have been an end of the matter. It is argued, however, that the Defendant's consent to the payment out of the money makes a difference. The Defendant was told by the Plaintiffs' attorney that these disputes between the husband and wife had been settled, so that there would be no difficulty about her executing a reconveyance, and that he might, therefore, safely consent to its being paid out. He does consent to its being paid out before reconveyance, and the money thus comes to the hands of the person into whose hands he would have been compelled to pay it if the action, to which he had no defence, had proceeded, and I see no reason for affecting him in any way with any equity arising from an arrangement between the other parties. His solicitor, *Holmes*, had advanced the money, and it was natural enough that he should attempt to make an arrangement for the transfer of the security to him; but this plan was never carried into effect. It is urged that he was privy to an arrangement that part of the money should go back to *Holmes;* but nothing of the kind is proved. Mrs. *Carr* would not accept the £83, so it was handed to *Holmes* that he might hold it for her, which he, not very prudently, undertook to do; but that cannot affect the mortgagor. Mrs. *Carr*'s representatives may have a right against *Manière*, or against *Holmes*' estate; but with that we have nothing to do. *Williams* was discharged, and the bill ought to have been dismissed with costs.

SIR W. M. JAMES, L.J., concurred.

Solicitors: Mr. *Charles Mallam;* Messrs. *Singleton & Tattershall.*

THOMSON *v.* SIMPSON.

L. C.
and L. J. J.
1870
July 26, 27.

6 HL 356–
358
9 Ch 587
10 Ch 64

Bill of Exchange—Appropriation—Representations.

The Plaintiffs purchased from the *New Orleans Bank* a bill of exchange drawn on the *Bank of Liverpool.* The manager of the *New Orleans Bank* at the time, told the Plaintiffs that there was, or would be at the maturity of the bill, a balance at the *Bank of Liverpool* more than sufficient to meet the bill, and that there was no doubt it would be paid. The course of dealing between the *New Orleans Bank* and the *Liverpool Bank* was that the former drew bills on the latter, and employed them also to collect the moneys receivable on bills remitted to them, the agreement being that the *Liverpool Bank* was never to be under cash advances, and the funds remitted had always been sufficient to meet its acceptances. Soon after the purchase, the *New Orleans Bank* suspended payment, and the *Liverpool Bank* refused to accept the bill. The funds in the hands of the *Liverpool Bank* were abundantly sufficient to meet all their acceptances for the *New Orleans Bank*, and also to pay this bill:—

Held (reversing the decision of *Stuart*, V.C.), that the statements of the manager were merely a correct statement of the course of business between the two banks, and did not give the purchaser of the bill any lien on the funds in the hands of the *Liverpool Bank.*

Per James, L.J.:—If what was said by the manager had amounted to a contract to charge the funds, the clearest proof would have been necessary that he had authority to make such a contract.

Affd House Lords 6 HL. 355

THIS was an appeal by the *New Orleans Bank* from a decision of Vice-Chancellor *Stuart* (1). The facts will be found fully stated in the report below.

Mr. *Fry*, Q.C., and Mr. *Robinson*, for the Appellants.

Mr. *Dickinson*, Q.C., Mr. *Cracknall*, and Mr. *Benjamin*, for the Plaintiffs.

Mr. *Fry*, in reply.

[The following cases were referred to: *Maunsell* v. *White* (2); *Ex parte Imbert* (3); *Ex parte Carrick* (4); *Thayer* v. *Lister* (5); *In re Agra and Masterman's Bank* (6); *Langton* v. *Waring* (7).]

(1) Law Rep. 9 Eq. 497.
(2) 4 H. L. C. 1039.
(3) 1 De G. & J. 152. 3 Jur NS 801
(4) 2 De G. & J. 208.
(5) 30 L. J. (Ch.) 427.
(6) Law Rep. 2 Ch. 391.
(7) 18 C. B. (N.S.) 315.

LORD HATHERLEY, L.C. :—

The sole question in this case is, whether, in consequence of representations made to his deceased partner, the surviving Plaintiff is entitled to a charge on the funds of the *New Orleans Bank* at the *Bank of Liverpool.* The Plaintiff's case was rested on two grounds; first, that the funds in the hands of the *Bank of Liverpool* were held by them for the purpose of answering bills; secondly, that there was a representation made which the *New Orleans Bank* was bound to make good out of those funds. The Vice-Chancellor rested his decision on the latter ground. We are glad, so far, to agree with the Vice-Chancellor in thinking that there clearly was no such appropriation of the funds to meet bills generally as to make each bill a specific charge on them. The only arguable question is, whether the representations made when the bill was purchased amounted to complete engagements affecting the assets in the hands of the *Liverpool Bank.* The *Liverpool Bank* were not in the habit of receiving anything as specifically appropriated to meet bills coming to them for acceptance. The *New Orleans Bank* sent bills to them for acceptance, and being bound not to let them be under cash advances, sent bills to them, and employed them to collect the cash receivable on those bills. The *Liverpool Bank* therefore accepted bills in confidence that they would have funds in hand to meet them. They at first hesitated to accept bills unless advised of them; but an arrangement was afterwards made by which they agreed with the *New Orleans Bank* to accept bills advised or unadvised. This was nothing but an agency established in order to give the *New Orleans Bank* facilities for dealing in the sale of bills on this country. The evidence is quite distinct that it was not the course of dealing to appropriate any funds to meet particular bills in any other sense than that in which it may be said that a man's balance at his banker's is appropriated to meet his debts, which is quite different from what is meant in law by appropriation. There was nothing to prevent the *New Orleans Bank* from drawing bills at sight to the full amount of the moneys in the hands of the *Liverpool Bank*, and it is extravagant to say that a man who has an agent employed to pay bills creates a charge on the funds in the agent's hands by the mere drawing a bill. It is necessary to make out a contract to charge specific funds which were with the *Liverpool Bank*, or which were on their road thither; for if there was only a personal contract, that would give nothing but a right of action. We need not consider the question as to future assets, for the allegations of the bill relate only to funds then at the bank. The case must turn on *Forbes's* evidence, for, *Bishop* having died, *Forbes* is the only person living who knows anything about the transaction. The Plaintiff relies on his affidavit, but his cross-examination considerably modifies it; and, taking them together it appears to me that all *Forbes* did was to state truly what was the ordinary course of business between his bank and the *Liverpool Bank*. Mr. *Benjamin* urged, why should anything be said about the funds in the *Liverpool Bank* if there was no intention to give a charge upon them? The answer is, that you may make inquiries about the amount of a person's property with a view of seeing whether he is a substantial person, without any view of getting a charge upon it. Suppose a country gentleman wants to borrow money—one who knows him will perhaps lend, one who does not will make inquiries, and if he hears that the proposed borrower has a good estate, will probably lend without any idea of having a charge. Suppose the *New Orleans Bank* to draw twenty bills in a day, the purchasers of nineteen of them know the course of dealing of the bank and make no inquiry, the twentieth makes such inquiries and receives such an answer as in the present case. Is he to have priority over the nineteen others? It would need something very strong to shew a bargain which would alter the whole course of business between the banks and stop all dealing with the funds appropriated. I find nothing in what *Forbes* said but a statement what the course of proceeding of the bank was, and not a contract to charge the funds. The bill ought to have been dismissed with costs.

SIR W. M. JAMES, L.J.:—

The case seems to be summed up in a few words of *Forbes* on his cross-examination: "The first *National Bank of New Orleans*, in the sale of these bills to *Thomson & Co.*, neither conferred, nor agreed to confer, any rights other than those of an ordinary indorsee or payee of a bill of exchange. I had no authority to confer any other rights." I am surprised that such an authority seems to have been assumed throughout. If the most formal agreement had been signed by *Forbes*, making these bills a specific charge on the funds in the hands of the *Liverpool Bank*, I should have required evidence of his authority to create such a charge. If I sent my servant to buy a horse for me, and to give a bill of exchange for it, I should be surprised to find that he had professed to give a specific charge on part of my property for its payment. Apart from the question of authority, I may observe that, when it is attempted to make out, in addition to the written contract contained in a bill of exchange, a collateral parol agreement, it is most important to have clear and satisfactory evidence as to the exact words used, and this case shews strongly how much caution is required in sifting such evidence, for the decision might turn upon whether the word "will" or "shall" was used. I agree in the view of the Lord Chancellor.

Solicitors: Messrs. *Clarke, Son, & Rawlins;* Messrs. *Sharpe, Parkers, & Pritchard.*

L. C.
and L. J. J.
1870
July 28.

12 Eq 63.
3 Ch D. 112

In re SPARROW.

Practice—New Trustee—Lunatic—Chancery.

When the person having power to appoint a new trustee is a lunatic, found so by inquisition, an order appointing a new trustee may be made in Chancery under the *Trustee Act*, 1850, s. 32.

J. G. SPARROW, by his will, devised his estates in strict settlement, and authorized the person for the time being in the actual receipt in possession of the rents and profits to appoint a new trustee or new trustees in the place of any trustee or trustees dying or being desirous of being discharged.

The testator died in 1838. His eldest son, *H. W. Sparrow*, who was entitled to the receipt in possession of the rents and profits, became lunatic, and was found to be so by inquisition, and a committee of his estate was appointed. One of the trustees of the will died, and the son, *H. W. Sparrow*, by his committee, presented a Petition, intituled "In Chancery and In the Matter of the *Trustee*

L.C.
and L. J. J.
1870
In re
SPARROW.

Acts," praying that *W. N. Tufnell* should be appointed a trustee of the will in the place of the deceased trustee.

The Petition was opposed, and the Vice-Chancellor *Malins* made an order referring it to Chambers to approve of a new trustee; but doubts having been raised whether an application ought not to have been made in Lunacy that the committee should appoint, the matter was mentioned to their Lordships.

Mr. *Osborne*, Q.C., for the Petitioner.

Mr. *Glasse*, Q.C., for some of the parties interested, referred to *In re Bowmer* (1); to the *Trustee Act*, 1850, sect. 32; and *Morgan's* Orders (2), and said that the Court must now decide whether these applications were to be made in Chancery or in Lunacy. Why could not the committee have made the application in Lunacy, instead of taking upon himself to apply to the Court?

THEIR LORDSHIPS said that the Court was not exercising any power given to a lunatic, but was exercising a statutory power. Suppose that the committee did not choose to apply, there must be jurisdiction in the Court to appoint a new trustee. Their Lordships made the order in Chancery.

Solicitors: Messrs. *Hyde & Tandy*; Messrs. *Prior & Bigg*.

EARL VANE *v.* RIGDEN.

L. C.
and L. J. J.
1870
July 25;
Aug 3.

Executor—Power to pledge Assets—Preference of One Creditor—Delegation of Power to collect Assets—Multifariousness.

An executrix assigned all the book-debts of her testator, which formed the bulk of his property, together with all the books of account, to one of the creditors, to secure the payment of his debt; and gave him a power of attorney to collect the debts in her name. The estate proved insolvent:—

Held (reversing the decree of *Malins*, V.C.), that the assignment was valid.

Semble, that a suit praying for the administration of the estate, and to set aside the assignment as invalid, was not multifarious, and that the creditor was properly made a party.

12 Eq 232
13 Eq 557
8 Ch 749
18 Ch D 9

THIS was an appeal from a decree of Vice-Chancellor *Malins*.

Stephen Rigden made his will, dated the 14th of June, 1867, and thereby devised and bequeathed all his real and personal estate to his wife, the Defendant, *Sarah Rigden*, and appointed her his sole executrix.

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(1) 3 De G. & J. 658. 5 Jur
N S 348

(2) 4th Ed. p. 100.

The testator died on the 27th of September, 1867, and his will was proved by the executrix on the 5th of October following. The testator's property, at the time of his death, consisted of two ships, which were mortgaged and were subsequently lost, some real estate, which was also mortgaged, book-debts, which were estimated at about £2000, and the value of his business and stock-in trade as a brick and tile manufacturer. He was indebted to the Defendant *Charles Jutson*, who was the brother of the executrix, in a sum of £534, upon a balance of account, the principal item of which was a bill of exchange for £532 2*s.* 3*d.*, drawn by *Jutson* and accepted by the testator. This bill had been discounted by the *Canterbury* branch of the *London and County Bank*, and became due on the 27th of September, 1867, the day of the testator's death. The consideration for the bill arose out of a joint speculation which the testator and *Jutson* had previously entered into, and under which they had incurred a joint liability to a considerable amount.

On the death of the testator, *Jutson* pressed the executrix to pay him or give him security for his debt, and accordingly, on the 5th of October, 1867, she executed a deed whereby she assigned to *Jutson* all the book and trade debts owing to the testator at the time of his decease, and all his ledgers and books of account, and gave him full power to collect the debts as her attorney; and it was thereby declared that, after payment of the said debt of £534, and interest and costs, the power of attorney should cease, and all the surplus of the proceeds of the debts should be handed over to the executrix.

The Plaintiff was a creditor for £1000, and filed the present bill against *Jutson* and the executrix, praying for the administration of the estate, and that the assignment might be declared void against the Plaintiff and the other creditors of the testator.

Jutson demurred to the bill for want of equity and multifariousness; the demurrer was overruled by the Vice-Chancellor, but the benefit of it was reserved till the hearing. A receiver was afterwards appointed, to whom *Jutson* delivered up the books and the money which he had received, amounting to about £1500, out of which a sum had been set aside to answer his debt.

The estate proved insolvent, and was being administered in another suit of *Baker* v. *Rigden*. The only question in the present suit was, whether the assignment to *Jutson* could be sustained. The Vice-Chancellor held that it was invalid, and *Jutson* appealed from this decision (1).

(1) 1870. Jan. 12.

SIR R. MALINS, V.C., said:—

I assume, for the purpose of my decision, that in respect of this transaction there was either actually money due at the time to *Jutson*, or that there was a liability to pay money under the bill. The drawer was surety for the acceptor, and therefore there was a debt or liability to pay money when called on. The testator died on the 27th of September. His will was not proved till the 5th of October, and on the very day on which the will was proved—in consequence, I suppose, of the importunities spoken of in the evidence—the widow and executrix is made to execute this deed:— [His Honour then read the principal clauses of the deed, and continued:—] Mr. *Warner* suggested that when the £534 was paid the deed would come to an end. That is not so; the cesser is not to take place till the debt, interest, and costs are paid. Who is to determine when that is done? It is impossible, in the face of this deed, for any one to do so but the mortgagee; for as to all the books of account, and everything relating to the debt, the effect of the deed is absolutely to disarm the executrix of the power of acting in the execution of the will.

Now the question is, whether that is a deed which, on any public or private principle, can be allowed to stand. The executrix was rendered completely powerless. She had handed over all the books of account, and she could not even tell who the debtors to the estate were. My opinion is, that, although the law is settled that an executor may prefer any one creditor to others of an equal degree, it would be a most lamentable thing if the doctrine were to be carried to such an extent as to support a transaction like this. No doubt it is the law, though I hope it will not be so much longer, that an executor may prefer one creditor to another, so that, as in this case, a sister may give the preference to her brother, or a father to his son. Yet this rule must receive a reasonable construction, and I am inclined to concur in the principle which appears to have been acted on by Vice-Chancellor *Wigram*, in *Hepworth* v. *Heslop* (6 Hare, at p. 569), where he draws a distinction between cases where the assets are in the hands of the executor and where they are not.

If, in the present case, the executrix had assigned to *Jutson* certain specified debts, which were believed to be good debts, with notice to the debtors to pay him instead of her, I am much inclined to think that the deed would be valid. But there is a marked distinction between such a deed and this. It was an ill-advised proceeding, which, if not actually dishonest, was so closely approaching it, that I think the proceedings ought to receive the marked disapprobation of any Court before which the matter is brought. Here is a testator known to have died insolvent, and this man, because he happens to be the brother of the executrix, importunes her, and takes

L. C. and L. J. J.
1870
Earl Vane v. Rigden.

Mr. *Glasse*, Q.C., and Mr. *Warner*, for the Defendant *Jutson*:—

The bill is multifarious in praying relief against *Jutson*. He is not a proper party to a suit for the administration of the estate. If the assignment amounted to a *devastavit*, the executrix is responsible, and the party in whose favour it was made is not a proper party to an administration suit, unless there was collusion, which is not charged in the bill: *Alsager* v. *Rowley* (1).

With respect to the validity of the assignment, it is a simple case of an executrix preferring one creditor before others of an equal degree, which she had full power to do. She had power to mortgage the assets to pay *Jutson*, and might appropriate a specific part to pay him: *Hepworth* v. *Heslop* (2). And why could she not mortgage the assets to him? No injustice was done to the other creditors by the form of the security, for the power of attorney ceased as soon as the debt, interest, and costs were paid. *Jutson* is willing to account, in the other administration suit, for all which he has received.

The Counsel for the Plaintiff were desired by the Court to confine their arguments to the question of the validity of the assignment, the Court being in their favour on the question of multifariousness.

Mr. *Cotton*, Q.C., and Mr. *Stevens*, for the Plaintiff:—

There was no debt actually due at the time of the testator's death. There was only a liability, for which *Jutson* might never have been called upon. But, assuming that there was a debt, the executrix had no power to make such an assignment. The right of the executor to prefer one creditor before another is a strictly

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advantage of the distressed condition in which she is placed immediately after the death of her husband. He gets a deed prepared which is grossly improper in its form, by which the executrix is made to denude herself of all power as executrix, putting him in possession of the power of receiving all the debts and dealing with them in such a way that they can only be recovered from him by a suit in this Court. The deed is one against which, on public principles, it is the duty of this Court to set its face. It is one that cannot stand, and must be set aside. The Defendant must pay so much of the costs of the suit as have been occasioned by the execution of that deed, and he must stand as a general creditor.

(1) 6 Ves. 748.

(2) 6 Hare, 561, 569.

legal power, and will not be extended or aided by a Court of Equity. The executrix went beyond her legal power in several respects. It was an assignment of *choses in action*, which is nugatory at law, and will not in such a case be aided in equity: *Lepard* v. *Vernon* (1). Again, the right of paying a creditor does not imply the power to mortgage the assets to a creditor. It was not a payment at law, and would not release the testator's estate. But, even if the executrix had power to mortgage part of the assets, she had no right to assign what was in effect the whole of the assets to one creditor, and surrender to him her power of collecting them. It was not only a *devastavit*, it was a breach of trust, which placed the administration of the assets in the power of a single creditor.

Mr. *Warner*, in reply.

LORD HATHERLEY, L.C.:—

The only point in this case which it is necessary for me to consider is, how far, assuming that the debt which was claimed by the Defendant *Jutson* was a good debt, the executrix was justified in making over to him a considerable portion of the testator's assets, namely, the debts which were owing to him in his business, by way of mortgage, as a security for the payment of this debt. The Vice-Chancellor does not seem to have been impressed so much with the difficulty as to the power of the executrix to mortgage the assets to the creditor, as by the circumstance that he was not satisfied of the *bona fides* of the transaction. Of course, if there was any fraud, it has to be proved by the Plaintiff. The Defendant *Jutson* has set forth his deed, and he swears to a debt which was constituted in this way: He says that he and the testator had a joint speculation, which resulted in their becoming jointly and severally indebted to a person in the course of these transactions, and that he paid the whole debt, which was then about £384; and further, that they had incurred a joint liability in respect of a bill of exchange for £500, and that ultimately the whole transaction was closed by his drawing on the testator, and the testator accepting, a bill for £532, which bill was to pass through the bank; and it appears to me there is nothing in the evidence that can induce the Court to say that this mortgage

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(1) 2 V. & B. 51.

L. C
and L. J. J.
1870
EARL VANE
v.
RIGDEN.

was fraudulent, and ought on that ground to be set aside. The utmost that can possibly be said is, that the total amount which is claimed by *Jutson* may not be due; but *Jutson* offers to go in under the other suit, instituted for the administration of the testator's assets, and have the debt inquired into, and the security settled for what may be really due.

12 Eq. 982

That being so, the question is simply this: The testator was a shipowner, and he had certain ships, and he had also certain book-debts owing to him. The book-debts nominally amounted to £2000, though it is doubtful whether they will ever realise that sum. Immediately after probate of the will, and a very short time after the testator's death, the Defendant *Jutson*, who was the brother-in-law of the testator, applies to his sister, the widow of the testator, and presses her, she being the personal representative, for payment of this debt. She not having the assets in hand by which the debt could be paid, assigns to him, by way of mortgage, the whole of the book-debts due to the testator. They do not seem, at all events, originally, to have constituted the whole of the property, because there were the ships of which he had given bills of sale, and on which there might or might not have been a surplus. If the assignment had comprised the whole of the property, I do not say how far that might or might not have made a difference. But it is nothing more than a simple mortgage of a specific portion of the testator's assets. The case of *Hepworth* v. *Heslop* (1), before Vice-Chancellor *Wigram*, shews, if anything were wanting to shew it, that a sale of part of the assets at a fixed price to clear a debt may be made to a creditor by the executrix. As long ago as the case of *Scott* v. *Tyler* (2) Lord *Thurlow* expressed his opinion clearly to be that the executor is at liberty either to sell or to pledge the assets of the testator. In fact, he has complete and absolute control over the property, and it is for the safety of mankind that it should be so; and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor. That, like all other frauds, will vitiate any transaction whatever.

18 Ch.D. 98

A question was raised as to whether this lady could depute by power of attorney her power as executrix to get in these debts in her name, as representative of the testator. I apprehend it is a fallacy to say that such an authority is void under the rule *delegatus non potest delegare.* The very point was discussed in the case of *Russell* v. *Plaice* (1). That was a case in which an executrix made a mortgage of a leasehold with power of sale, and it was argued that the executor could have sold the leasehold, but the mortgagee could not do so, because the power was a delegated power. The Master of the Rolls held, as it seems to me, quite correctly, that in the eye of this Court, as well as in the eye of a Court of Law, the executor is the absolute owner of the property; he does not stand in the position of a *delegatus,* and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals. I have, therefore, no doubt in the present case that, as the executrix might have mortgaged this portion of the assets to a stranger in order to raise money to pay the creditor, so there is no reason why she should not mortgage it to the creditor himself that he may pay himself, in the absence of fraud. It seems to me, therefore, that the bill should be dismissed as far as the Defendant *Jutson* is concerned, with costs, he undertaking to go in and prove his mortgage debt in the other suit.

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(1) 6 Hare, 561.

(2) 2 Dick. 712, 725.

8 Ch 749

SIR W. M. JAMES, L.J.:—

I entirely concur with the Lord Chancellor. It appears to me that there are some very simple propositions which dispose of the whole case. By the law of the land the legal personal representative is entitled to give preference to one creditor over another in equal degree, and it appears to me that that right of giving preference cannot be affected by the fact which seems to have weighed with the Vice-Chancellor, that the legal personal representative is a woman and a widow, and the sister of the creditor, and that the creditor, without due delicacy, or without proper feeling, pressed his sister in her early widowhood to give him this preference. In a matter of relation between debtor and creditor this Court has no right to require delicacy or proper feeling where the creditor is only exercising his legal right.

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(1) 18 Beav. 21. 18 Jur 254

L. C.
and L. J. J.
1870
EARL VANE
v.
RIGDEN.

8 Ch 749.

With regard to the rights of mortgagees, it seems to me to be settled on principle, as well as by authority, that an executor has full right to mortgage as well as to sell, and it would be very inconvenient and very disastrous if the executor were obliged immediately to convert into money by sale every part of the assets of the testator. It is a very common practice for an executor to obtain an advance from a banker for the immediate wants of the estate by depositing securities. It would be a strange thing if that could not be done. If the executor can give a preference to a creditor by paying money to him, it appears impossible to say that he cannot give the preference by mortgaging the assets to him, which would be the same thing in effect as if he mortgaged to a stranger to raise the money, and paid the money to the creditor.

Then, with regard to the supposed breach of trust in assigning all this large amount of property to the creditor, the executrix does not relieve herself in any way whatever from her responsibility in respect of those assets. The mortgagee is her agent or attorney, and can only receive them as her attorney; and by the form which the transaction has assumed of the attorney being mortgagee, there is this additional security, that the attorney must be answerable for all receipts, and for everything which, but for his wilful neglect or default, he might have received. It is impossible to say that the transaction in that respect was injurious to the estate. I am of opinion, therefore, that the bill has failed, and that it ought to be dismissed as against *Jutson* with costs.

Solicitors for the Plaintiffs: Messrs. *Young, Maples, Teesdale, & Nelson*, agents for Messrs. *H. B. & C. Wright, Sunderland.*

Solicitors for the Defendants: Messrs. *Dubois & Maynard*, agents for Mr. *J. Towne, Margate.*

L. JJ.
1869
May 29, 31.

In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.

Ex parte HARTRIDGE AND ALLENDER.

Injunction—Restraining Application for Private Act of Parliament—Jurisdiction.

Although there is no doubt that the Court of Chancery, by virtue of its jurisdiction *in personam*, has power to restrain an improper application to Parliament for a private Act, yet it is difficult to conceive a case in which it would be right for the Court to exercise that power.

Injunction restraining directors from promoting a bill discharged.

THIS was an appeal from an order made by Vice-Chancellor *Stuart* in the matter of the *London, Chatham, and Dover Railway Arrangement Act,* 1867 (30 & 31 Vict. c. ccix.).

By that Act it was provided that from and after the passing of the Act no motions, suits, or other proceedings against the company, with certain exceptions, should be continued or commenced during a period of ten years without the sanction of the Court of Chancery.

By the same Act a board of directors was appointed, of whom four were mortgage directors, to represent the mortgagees, and four share directors, to represent the shareholders; and various provisions were made for the management of the company during the "suspense period," for the raising of money by debenture stock, and for the decision of questions between the general creditors, mortgagees, and shareholders, by application to the Court of Chancery.

On the 5th of August, 1868, an order was made by Vice-Chancellor *Stuart* appointing *William Hartridge* and *George Allender* to be representatives of the stockholders and shareholders of the "General Undertaking" of the company, for the purpose of prosecuting certain inquiries in Chambers directed by the Court.

In the session of 1869 a bill was presented to Parliament, and promoted by the directors, for conferring additional powers on the company, and for enabling the affairs of the company to be referred to arbitration. Before the bill was presented to the House of

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

Commons its provisions were approved by general meetings of the mortgagees and shareholders of the company. During the progress of the bill through the House of Commons it was materially modified, and provisions were introduced for referring all matters affecting the company to the arbitration of the Marquis of *Salisbury* and Lord *Cairns*, without any appeal. The bill in this form had passed the House of Commons, and had been read the first time in the House of Lords, when a summons was taken out by *Hartridge* and *Allender* for permission to them, as the representatives of the stockholders and shareholders of the General Undertaking, to oppose the passing of the said bill, or that the directors of the company might be restrained from further prosecuting or promoting the said bill in Parliament in the name of the company, and from using the name of the company in introducing, prosecuting, or promoting any other bill in Parliament affecting the rights and interests of the stockholders and shareholders in the General Undertaking without the previous sanction of the Court.

The Vice-Chancellor granted an injunction restraining the directors from proceeding with the bill, and gave leave to the applicants to oppose the bill if promoted by any other persons (1). From this order the directors appealed.

(1) 1869. May 27.

SIR JOHN STUART, V.C.:—

This Court recently felt compelled to express its disapprobation of the conduct of the persons who now act as the directors of this unfortunate company. Their authority to act as directors is given by the Act of 1867, and they were appointed with a view to the purposes of that Act. The Act was passed for the purpose of authorizing the company to raise an immense sum of money to satisfy certain claims. It was passed by Parliament on the faith of representations that this large sum could be raised—a representation which now appears to be delusive. The purpose of the Act having failed, I stated on a former occasion that it remained to be shewn for what purpose, useful for the interests of the honest shareholders and creditors, they now act as the governing body of the company. What is now to be disposed of is an application to restrain the persons named, who are now the directors, from further promoting the bill now pending in Parliament. The first alternative of the summons is, that the applicants, as the persons appointed by order of this Court to represent the stockholders and shareholders, may have leave to oppose the passing of the bill. It is an application on behalf of the persons beneficially interested against the directors, whose position, being entirely fiduciary towards the shareholders, is in fact that of trustees. The substance of the applicants' complaint is, that the directors in their proceedings before Parliament are betraying the interests of the honest shareholders, and are abusing the powers

An appeal was also, by arrangement, heard at the same time from another order of the Vice-Chancellor, made upon the application of Mr. *Gardner* and others, that the directors should pay

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

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conferred on them by the Act of 1867 for purposes injurious to the company; that they have misled Parliament by inaccurate representations; that they are seeking to persuade Parliament to take away from the shareholders the benefit of decrees made in their favour in this Court, and also asking of Parliament its authority to burden the honest shareholders and honest creditors of the company with an enormous amount of costs and expenses improperly incurred, which this Court has refused to sanction. It is proper to notice that the evidence shews that the persons who now apply to make these serious charges represent shareholders to the amount of five millions of money. These heavy charges, brought against the directors by this application, have not been met by any evidence, nor even by any explanation. If the explanation, and their defence on the merits, which has not been attempted before me, is withheld because there is to be an appeal against the order I am about to make, that is unfortunate, and cannot lead to the proper administration of justice, because all the most important proceedings in the affairs of this company have taken place in my Chambers, and before me and my Chief Clerk, and are not within the knowledge of the Court of Appeal. Explanations and topics of defence discussed before me could be dealt with by me on sources of information which would enable me to express the ground of my opinion of their value. This might be useful, if not necessary, to enable the Court of Appeal to discharge its duty satisfactorily. The application has been resisted before me on grounds purely formal. First, it was argued it was too late, as the bill had passed the House of Commons, and had been read once in the House of Lords. This objection seems to me of no value. It cannot be too late to bring forward such a case while the bill is pending. Secondly, it is said that the funds of the company (that is the funds of the applicants) should not be wasted by an opposition to the bill, and that they might apply to Parliament without the sanction of this Court. Considering that the affairs of the company are now being administered under the orders of this Court, I think the applicants have taken a proper course in asking the sanction of the Court. Moreover, it is my opinion that the directors were not justified in applying pending the proceedings in this Court. Thirdly, the cases of *Ware* v. *Grand Junction Water Works Company* (2 Russ. & My. 470), *Heathcote* v. *North Staffordshire Railway Company* (2 Mac. & G. 100), and *Stevens* v. *South Devon Railway Company* (13 Beav. 48), were cited to shew that this Court had no jurisdiction to restrain the directors from promoting this bill. These cases, properly understood, are authorities in favour of this application. They prove that this Court will restrain the promoters of a private bill in Parliament from proceeding in Parliament if a proper case is made out for restraining them. Lord *Cottenham* said, in *Heathcote* v. *North Staffordshire Railway Company*, "In a proper case, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction touching proceedings in Parliament for a private bill, or a bill respecting property." In a subsequent part of his judgment he goes on to

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

into Court a sum of £152,342, which had arisen from the tolls of the company. Judgment on both appeals was given at the same time; but the questions raised in the second were not of a nature to justify a report.

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make observations on the powers of Parliament, which are applicable to public Acts rather than to private Acts. Therefore, upon the authorities cited by the directors, the only question is, whether the applicants have shewn a case sufficient to induce the Court to grant their application. It seems to me that the case is sufficiently made out. It is laid down in Sir *T. May's* Treatise on Parliament, p. 633, "that as to private bills before Parliament, the persons whose private interests are to be promoted appear as suitors for the bill, while those who apprehend injury are admitted as adverse parties to the suit." He also says (p. 634) that the solicitation of a bill in Parliament has been regarded by Courts of Equity so completely in the same light as an ordinary suit, that the promoters have been restrained by injunction from proceeding; and he shews that it is otherwise as to the case of a public Act, where the functions of Parliament are wholly legislative, and not in part judicial, as they are in the case of a private Act. *Blackstone* says that private bills have been relieved against where obtained on fraudulent suggestions. In this Court mistake or misrepresentation may be as good a ground for relief as fraud. As the directors are in fact mere trustees for the shareholders who form the company, if this Court sees that they are acting in a manner contrary to their duty, and injurious to the shareholders, the Court is bound to restrain them, and to take the matter out of their hands. It is proved that the title of the bill which they are promoting does not express its real and important purpose, and is therefore calculated to mislead. It is proved that they have had inserted in it clauses which deprive the company of the benefit of decrees made in their favour in this Court. In the litigation with the *Kent Coast Railway Company* it is proved that although the decrees in that case in favour of the shareholders who now apply were signed and enrolled, and put an end to the litigation nearly two years ago, the 19th clause of the bill untruly states that the matter is still in dispute in the High Court of Chancery; the insufficient apology for this improper statement is, that a petition of appeal has been presented to the House of Lords. It is proved that clauses are inserted to throw upon the shareholders who now apply, and whose interests are confided to these directors, the burden of enormous costs and expenses to which they are now liable. Without going further into the objectionable nature of the bill, it seems to me that there are in these particulars enough to shew that the present application ought to be granted, and that the matter should be taken out of the hands of these directors, and that they should be restrained from taking any further proceedings in promoting this bill, and from using the name or seal of the company for promoting this or any other bill in Parliament affecting the affairs of this company without the leave of this Court. I think it my duty to call attention to other circumstances. I have reason to doubt whether from the complication of conflicting interests these directors are not subjected to influences which make an

Sir *Roundell Palmer*, Q.C., and Mr. *Kekewich*, for the directors, contended that there were good grounds for applying to Parliament, and there was a very large majority at the two meetings in favour

L. JJ.
1869

In re
London,
Chatham,
and Dover
Railway
Arrange-
ment Act.
Ex parte
Hartridge
and
Allender.

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unbiassed discharge of their duty too difficult to make it desirable that they should continue to govern the affairs of this company. Of course, in proceedings before Parliament, they act through their solicitor. But there are other persons who seem to be busy in the affairs of this company who in the proceedings now before Parliament, as well as in this Court, are now solicitors sometimes for the company, and sometimes against it, and who seem to me to have, perhaps from their great eminence and professional skill, the power of appearing as solicitors for the company or against the company as may suit their own purposes, or the purposes of one or more of their various clients. It frequently happens in litigation that the Court is obliged to interfere as to the conduct of the proceedings in litigation, by compulsory orders, to take the conduct of causes out of the hands of professional men in this position. There is a remarkable paragraph at page 21 of the report, which is the exhibit *B.*, verified by one of the affidavits on this application. In that report the committee of investigation appointed by the shareholders say, "Until means can be devised to meet the obligations to creditors, the orders made and to be made by the Court of Chancery afford the best protection to the various classes of creditors, especially the debenture holders, and a guarantee against any further improper dealings with the assets of the company. Steps have been taken by the company to appeal against the order of the Court appointing receivers, but the expediency of prosecuting such appeal is very questionable." What is the history of that appeal? The orders of this Court, which are described in this report as so beneficial, were obtained at a time when Messrs. *Freshfields*, solicitors of the very highest character, were the solicitors of the company. Suddenly they disappear as solicitors of the company, and the appeal is prosecuted by Messrs. *Baxter*, *Rose*, *& Norton*, solicitors of very extensive practice, very eminent, and whose character is very well known. The results of that appeal were disastrous to the honest shareholders and honest creditors of this company. The subsequent proceedings in this Court have in a great degree redressed the misfortune, and all would have gone on in this Court with that benefit to the creditors and shareholders which is mentioned in the report, and by this time a large sum would have been forthcoming, and by this time paid to the creditors. Why has that been prevented? It has been prevented by the Act of 1867, in which the same solicitors, Messrs. *Baxter*, *Rose*, *& Norton*, were the solicitors for the promoters. I have already noticed that this Act was obtained on the representation that a large sum of money could be raised. That is proved to be a mistake, and the Act has proved futile for its great purpose. But it was effectual for the purpose of removing the protection to the shareholders and the creditors afforded by a receiver, which, according to the true representation of the report, "afforded the best protection to the various classes of creditors, especially the debenture holders, and a guarantee against any further improper dealings with the assets of the company." That protection was

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT. *Ex parte* HARTRIDGE AND ALLENDER.

of the bill. The alterations in the bill in its passage through the House of Commons were not made at the instance of the directors. Such an injunction as the present had always been refused by the Court, and in some of the cases the circumstances were

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removed by the Act of 1867. How these assets have been subsequently dealt with remains to be shewn. After this Act was passed Messrs. *Baxter, Rose, & Norton* disappear as the solicitors of this unfortunate company, except in the suit as to the rolling-stock, and the company have since been represented by various other solicitors. But they did not disappear in that character till they had, as solicitors for the company, succeeded in obtaining the important advantage to the company of defeating the claims of the *Kent Coast Railway Company* by the decree of this Court of the 6th of July, 1867, which was affirmed on appeal (Law Rep. 3 Ch. 656). These same solicitors now appear before Parliament, not as solicitors for the company, but for other parties nominally opposing, but, in fact, promoting, the bill which seeks to set aside those very decrees. Moreover, these same solicitors, while acting for the company in promoting the Act of 1867, file a bill against the company on the 25th of March, 1867, as solicitors for the *General Credit Company*. On this occasion it seems to me unnecessary to state any further facts as to the unsatisfactory position of these solicitors and the directors in the affairs of this company. I have thought it proper to state so much, as it is matter which ought not to be withheld when Parliament, in its judicial character, is dealing with the affairs of this company, and is asked to stop the course of justice in this Court. So far as I know, no case has occurred in which, pending proceedings in this Court, Parliament has ever interfered with the course of justice in the proper tribunal. If such a precedent is established, it does not require much sagacity to see that disastrous results will ensue. Nor do I understand that in this case the bill could have proceeded so far but that, by a misrepresentation founded on a mistake, the Committee of the House of Commons were induced to believe that this Court could give no adequate relief. I abstain on this occasion from going further into the provisions of this Act of Parliament, which seems founded on mistaken representations of the proceedings, and powers, and duties, of this Court; but it is open to the present applicants, or any shareholders or creditors of this company, to apply to this Court for an order mandatory on the proper parties, to prepare and lay before this Court a scheme for the arrangement of the affairs of the company, of the nature mentioned in the 21st section of this bill, or on any other proper footing, or for leave themselves to prepare and submit such a scheme for the approbation of this Court. The order on this summons will be according to the second alternative, to restrain the persons named in the summons from further promoting the bill before Parliament, and from using the seal of the company for any such or the like purposes; and as other persons may apply to Parliament for leave to promote the bill, there must be an order that the applicants have leave to appear and oppose any further proceedings on this bill.

far stronger in favour of the interference of the Court than in the present.

[They referred to *Ware* v. *Grand Junction Water Works Company* (1); *Stevens* v. *South Devon Railway Company* (2); *Heathcote* v. *North Staffordshire Railway Company* (3); *Gladstone* v. *Ottoman Bank* (4); *Steele* v. *North Metropolitan Railway Company* (5); *Attorney-General* v. *Manchester and Leeds Railway Company* (6); *Lancaster and Carlisle Railway Company* v. *North Western Railway Company* (7).]

Mr. *Dickinson*, Q.C., and Mr. *T. A. Roberts*, in support of the order, argued that the directors in presenting the bill were committing a breach of trust, and abusing their position as representing the company. They had no right to use the name and seal of the company for such a purpose. The applicants could not oppose the bill in Parliament, for Parliament would not hear individual shareholders.

SIR C. J. SELWYN, L.J., after stating the nature of the applications, continued:—

These two applications, both relating to the matter of the same company, have, by arrangement between the counsel, been heard and argued together. In pursuance of that arrangement I shall begin with some general observations having a bearing upon both these orders, and shall then direct my attention to each of the applications in its turn.

The first observation it is necessary to make is, that neither of these applications is to the ordinary jurisdiction of the Court, but in both cases to the jurisdiction founded on the *Arrangement Act* of 1867. That Act, as the Vice-Chancellor has said, is one of a very extraordinary character, interfering with and suspending all the ordinary rights and powers of the directors and shareholders, and even of the creditors. But it has received the sanction of the Legislature, and it is the duty of the Court to give effect to its

(1) 2 Russ. & My. 470.
(2) 13 Beav. 48.
(3) 2 Mac. & G. 100.
(4) 1 H. & M. 505.
(5) Law Rep. 2 Ch. 237.
(6) 1 Railw. Cas. 436.
(7) 2 K. & J. 293.

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

provisions, however anomalous they may be. [His Lordship then referred to several of the sections of the Act, and continued:—]

I will now deal separately with these two applications, and I will first take that which seeks to discharge the order by which the application to Parliament is restrained. The original application was made by two persons, who were chosen to represent, though for a different purpose, a large class of shareholders. I think that if the Court has jurisdiction in the case, and if the proceedings on the part of the directors can be shewn to be *ultrà vires*, the Court will consider the application sufficiently grounded, although made on the application of only two shareholders. I think that an application by any one shareholder would be sufficient for that purpose. But when we are asked to consider this as the application of persons holding £5,000,000 of capital in the company, it is necessary to observe that these two persons were appointed to represent these shareholders for the purpose of certain inquiries, and that they have no authority to represent them in any matter irrespective of those inquiries. On the other hand, we have the fact that the application to Parliament is made by the board, who are assumed by the Legislature to be properly constituted, and to represent in their double origin the shareholders as well as the mortgagees. In addition to this, we have the fact that two meetings were held with reference to the bill, and that at both of them the promotion of the bill in Parliament was carried by a very large majority. It is quite true that the bill which was submitted to those meetings was very different to the bill as it finally passed the House of Commons. The bill, as it was originally submitted, appears to have related to a voluntary compromise, but afterwards to have assumed the shape of a bill for a compulsory reference to arbitration. But at the same time there is no evidence that the shareholders have so far changed their opinions that they are to be treated as being entirely hostile to the bill as it is now before Parliament. I think we must take it upon the evidence before us that those who by the authority of Parliament have been invested with such discretionary powers have exercised that discretion by the introduction and promotion of this bill; and secondly, that the meetings have sanctioned the submission of the question as to the appointment of the arbitrators, whether voluntary or compulsory, to the consideration of Parliament.

Under these circumstances, the question arises, whether it is fit for the Court to restrain the further prosecution of the bill by the directors. Upon the law as applicable to these subjects there can be no doubt. The learned Vice-Chancellor has said that the cases cited before him were authorities in favour of such an interference by the Court. To a certain extent I agree with the opinion expressed by the Vice-Chancellor, and I think there are expressions to be found in all the judgments that were referred to, shewing that the Court, although it does not assume the power to interfere with the proceedings of Parliament, still has a power to act *in personam*, and, if a proper case should be proved, to restrain any person from making an improper application to Parliament; but, as the learned judges who decided those cases have also said, it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise that power. I agree, therefore, with the Vice-Chancellor, in saying that such cases are authorities for the possession of such a power by the Court; but what we have to consider is, whether, in the present case, it is proper for the Court to exercise that power. On this point the authorities are abundant. It is sufficient to refer to two, namely, *Attorney-General* v. *Manchester and Leeds Railway Company* (1), where the Lord Chancellor *Cottenham* held that the conduct of the company in promoting the bill before Parliament was a violation of the undertaking entered into by them—and yet he refused to restrain them from further soliciting the bill; and *Lancaster and Carlisle Railway Company* v. *North Western Railway Company* (2), where the present Lord Chancellor, then Vice-Chancellor, declined to interfere, although the company who were applying to Parliament had expressly contracted not to make such application.

Now these cases appear to me very much stronger than the present in favour of the interference of the Court, for here the whole proceeding is founded on the Act of Parliament of 1867, which was of a very special character, and which was very likely to require from time to time to be amended. And we have the

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(1) 1 Railw. Cas. 436.

(2) 2 K. & J. 293.

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

persons, who were by that Act intrusted with such wide power for the management of the company, applying to Parliament to interfere and to deal with the affairs of the company in a different way to that in which they were dealt with by the Act of 1867. And we have two meetings, one of creditors and one of shareholders, approving of an application to Parliament, although not of the application precisely in its present form. Can it be said, then, that because two persons have been appointed to represent the interests of certain shareholders in another proceeding, they are entitled to ask this Court to look at the particular clauses of the bill, as it now stands, in order to shew that the directors were guilty of a breach of duty in submitting them to the consideration of Parliament?

That argument was mainly founded on this: It was said that the directors are using the name of the company, and that they are not entitled to use its name. If it had been shewn that the directors were endeavouring to conceal their real position from Parliament, there might be some force in the objection. But they came before Parliament as the eight persons who were, by the Act of 1867, appointed to administer, during a temporary period, the affairs of the company, and they state on the face of the bill that which, in fact, could not be concealed from Parliament, namely, the circumstances under which they were appointed, the exact position which they fill, and the character in which they make the application; and it is impossible to think that either House of Parliament could be so ignorant of all the facts of the case submitted to them—so blind to all the surrounding circumstances—as to suppose that these directors were using the name and seal of the company under the same circumstances as directors in an ordinary case would do. But, even in the case of a bill promoted by the directors of an ordinary company, whose powers had not been in any degree interfered with by Act of Parliament, the House of Commons always thinks it necessary that there should be certain preliminary proceedings by the shareholders, in order to ascertain whether the ordinary directors do or do not represent the feelings of the shareholders with respect to a new bill. And, accordingly, that course seems to have been adopted in the present case. Whether, in consequence of the alteration which has taken place in this bill, it may or may not be necessary, in the view of either House, to have any further meeting of shareholders or creditors, it is not for us to determine. It is sufficient to say that it cannot be considered an improper use of the name and seal of the company by these directors to put them to an ordinary Petition for a bill, without attempting to assume any other character or capacity than that which these directors do and must fill, and which must be known to both Houses of Parliament. I think, therefore, that ground wholly fails; and, in truth, the present matter is reduced to this, that in the opinion of certain persons, including the two gentlemen who have made the application, and including the learned Vice-Chancellor, it is not expedient that the bill should pass. That matter is one with which I think we have nothing to do, and upon which we are not called to pronounce any opinion; and we certainly have no intention, in the least degree, of interfering with the right or power which these two gentlemen, or any other shareholders or creditors, have of appearing before the House of Lords and opposing the bill as it now exists. At the same time we have no intention of authorizing it in any way. My opinion is, that it is the duty of the Court simply to hold its hands, and not to interfere in favour of one side or the other, nor to express any opinion as to the propriety of the bill or any clause in it. Therefore, I think what ought to be done is simply to discharge the order of the Vice-Chancellor, and to leave the applicants the liberty which they and all the other shareholders possess, to take whatever course they may think fit with respect to the opposition to the bill; but not so as to enable them to say that they are taking that course with any sanction of this Court.

[His Lordship then disposed of the other application, and in that case also discharged the Vice-Chancellor's order. He then continued :—]

With respect to the costs, I have always attached great importance to the rule that the costs should follow the event, and I have always been unwilling to allow any exception to that rule. But, in the present case, having regard to the course of the proceedings in the Court below, I think that justice will be met by ordering that the costs of the directors, both here and in the Court below, should be paid out of the fund in their hands, and

L. JJ.
1869
In re LONDON, CHATHAM, AND DOVER RAILWAY ARRANGEMENT ACT.
Ex parte HARTRIDGE AND ALLENDER.

that all other parties to these proceedings should bear their own costs both here and in the Court below.

SIR G. M. GIFFARD, L.J. :—

With respect to the first of these two applications, beyond all doubt both authority and principle are one way; and those well-known authorities and that well-known principle have not been attempted to be impugned in argument. We have the authority of Lord *Brougham*, Lord *Cottenham*, Lord *Chelmsford*, and the present Lord Chancellor, one and all agreeing that, though there may be some special cases under which, by the jurisdiction *in personam*, an injunction of this description may be granted, yet that in no case which has ever come before the Court has such an injunction been granted, nor has any one ventured to say in what particular case such an injunction would be granted. Here I have been unable to see any equitable ground for interfering. First of all, these gentlemen are constituted directors by this Act of Parliament, not only as representing shareholders, but as representing mortgage creditors. They have given to them larger powers than are ordinarily given to directors, and when the bill itself was brought into the House of Commons they obtained the assent, both of the creditors and of the shareholders, by a large majority, to that bill. I quite agree that no consent has been given to the bill as altered by the House of Commons, but I am satisfied it is not essential that such an assent should be given, and I am equally satisfied that there is no ground for saying that dissent has been expressed by a majority, or anything like a majority; or, in fact, as far as any evidence before us goes, by more than those gentlemen who appear here at the bar. I should certainly look at this application as if it had been made by a shareholders' bill—as if these gentlemen had filed a bill of that description. Consistently with the authorities and principles to which I have referred, I do not hesitate to say that that order ought not to have been made in the Court below, restraining these directors from promoting this bill, the bill having been passed by the House of Commons, and being now, or about to go immediately, before the House of Lords. In point of fact, I listened with all the care I could to the arguments that have been adduced, but unless we are to suppose that

L. JJ.
1870

In re London, Chatham, and Dover Railway Arrangement Act.
Ex parte Hartridge and Allender.

the House of Commons and the House of Lords are wholly incompetent to make inquiries at any time, and to transact that business which they transact daily, there really is no foundation whatever for that argument. It was stated long ago by Lord *Eldon*, and repeated by Lord Justice *Turner*, that even where you file a bill to restrain a company in the case of a foreign jurisdiction, you always give credit to the foreign jurisdiction to do that which is right. *À fortiori* here I apprehend you would give credit to the House of Commons and to the House of Lords for having a desire to do that which is right in the matter; and one may say at once that the mode in which these directors are proceeding is simply the old, the regular, and the constitutional mode of proceeding where you desire to alter the rights of parties in a case in which, by the law as it exists, they cannot otherwise be altered. That being so, there is no ground whatever for sustaining the first part of the order, and I should be the last person to sanction the opposition of any shareholders, as having the direction of this Court, with a view to oppose any proceedings before the House of Lords. It is for the House of Lords to judge in that matter which they will hear, and in which they will say what information they will require, and what they will not require. On both grounds, therefore, I think this order ought to be discharged, although I agree with my learned brother that, considering the course the matter took in the Court below, that order ought to be discharged without costs. Most assuredly, if any application of the kind should come before this Court again, I should discharge it with costs without the least hesitation.

[His Lordship then disposed of the other application, and of the question of costs, in the same manner as Lord Justice *Selwyn*.]

Solicitor for the Company: Mr. *W. Cleather.*

Solicitor for Messrs. *Hartridge* and *Allender*: Mr. *John Turner.*

L. J. G.
1870
June 10, 11.

17 Eq 326,
17 LT 167

BOOTH *v.* COULTON.

Annuity—Charge—Income or Corpus.

A testator gave his real and personal estate to trustees, in trust to pay his debts and legacies, and then, out of the annual profits of the residue, to pay three life-annuities, and, "subject as aforesaid," to stand possessed of the residue, upon trust to apply the income for the benefit of *G. B.* for life, and after his death the testator gave the residue to *P. B.* The income of the residue proved insufficient to pay the three annuities in full, and the trustees paid them rateably till November, 1868, when one of the annuitants died with an arrear owing to him; the tenant for life being still living:—

Held (affirming the order of *Stuart*, V.C., with a variation), that the annuities were a continuing charge on the rents and profits, and that the rents and profits since November, 1868, must be applied first in payment of the arrears of the three annuities *pari passu*, and then in payment of the two subsisting annuities.

THIS was an appeal from an order made by Vice-Chancellor *Stuart*.

J. G. Booth, by will dated the 20th of September, 1849, gave all his real and personal estate to trustees, in trust to pay all his debts and funeral and testamentary expenses, and then certain legacies; and on further trust, that they, their heirs, executors, and administrators, should out of the annual profits of the residue of his said estates pay to his son *Philip Booth* during his life the annual sum of £400, by equal half-yearly payments on given days, and that they should in like manner pay the annual sum of £100 to *William Batchelor* during his life, and that they should in like manner pay to *Sophia Coulton* during her life the annual sum of £600. And, "subject as aforesaid," the testator directed that his trustees should stand seised and possessed of all and singular his said real and personal estates, upon trust to pay and apply the rents, issues, and annual profits thereof to and for the maintenance and benefit of his son *George Booth* during the term of his natural life, in such manner as they should think fit; and from and after the decease of *George Booth*, the testator gave, devised, and bequeathed all and singular the said residue of his real and personal estates to his son *Philip Booth*, his heirs, executors, and administrators.

See [illegible] 11 Hare [illegible]

After the testator's death the income became, and ever since the year 1863 had been, insufficient to pay the annuities in full, and the trustees applied it in paying them rateably. *William Batchelor* died on the 3rd of November, 1868, and there was then due to him a considerable arrear on account of his annuity. *George Booth*, the tenant for life, was still living. A suit having been instituted for the execution of the trusts, and a receiver having been appointed, a summons was taken out to determine how the annuities ought to be paid. The summons asked that the receiver might be at liberty until further order, to apply the income that had arisen since the 3rd of November, 1868, and to arise from the testator's estate, in keeping down so far as the same would extend the annuities of £600 and £400 respectively. On the hearing of this summons Vice-Chancellor *Stuart* made the following order: "This Court, being of opinion that the annuities of £400, £600, and £100, respectively, bequeathed by the will of the testator to *Philip Booth*, *Sophia Coulton*, and *William Batchelor* deceased, are respectively charges upon the income of the estate of the testator, doth order that the receiver be at liberty until further order to apply the income that has arisen since the 3rd of November, 1868, and to arise from the estate of the testator, in payment of the arrears of the said three annuities of £400, £600, and £100, and in keeping down, so far as the same will extend, the said annuities of £400 and £600 rateably with the said arrears."

The persons claiming under *Philip Booth*, being entitled both to the *corpus* of the residue, and to *Philip Booth*'s annuity of £400, appealed from this order.

Mr. *Greene*, Q.C., and Mr. *G. N. Colt*, for the Appellants:—

The annuities are charges only on the rents and profits accruing *de anno in annum*, and are not a charge on the *corpus*, nor even on rents accruing after the death of the annuitant. The words "subject as aforesaid" do not mean "subject to the aforesaid annuities," but "subject to the above direction for payment out of yearly rents."

[They referred to *Foster* v. *Smith* (1); *Darbon* v. *Rickards* (2);

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(1) 1 Ph. 629.

(2) 14 Sim. 537.

L. J. G.
1870

BOOTH
v.
COULTON.

Stelfox v. *Sugden* (1); *Birch* v. *Sherratt* (2); *Sheppard* v. *Sheppard* (3); *Baker* v. *Baker* (4).]

Mr. *Prendergast*, Q.C., and Mr. *L. Field*, for the executors of *W. Batchelor*, were not called on.

June 11. SIR G. M. GIFFARD, L.J.:—

I have had an opportunity of considering this case since yesterday, and I confess I can see no ground for differing from the opinion of the Vice-Chancellor. I think that the charge of the annuities is a general charge upon the rents and profits. First of all, there is a general charge upon the *corpus* for the debts and for a certain number of legacies; then the property is given upon further trust that the trustees "do, out of the annual profits of the residue of my estate, pay to my son *Philip Booth* during his life the annual sum of £400;" and then the other annuities are directed to be paid in the same way. It is true that they are directed to be paid half-yearly upon specified days, but there is not a word said about their being to be paid out of the annual profits to accrue in the meantime in each and every year, nor is there a word said about their being paid out of the annual profits to accrue during the lifetime of the annuitant. Then the ultimate gift is this, "and subject as aforesaid," that is, subject to the full payment of all the annuities, the testator directs that the trustees and the survivors and survivor of them "do stand seised and possessed of all and singular my real and personal estates, upon trust to pay and apply the rents, issues, and annual profits thereof to and for the maintenance and benefit of my son *George Booth*." The result of that is that the annuities are a charge upon the annual profits, and there is no limitation whatever of the charge upon the annual profits. I do not think that any person beneficially interested under the will can take anything till these amounts are paid in full.

Mr. *Prendergast*:—Your Lordship declares the annuities a charge upon the *corpus*?

(1) Joh. 234.
(2) Law Rep. 2 Ch. 644.
(3) 32 Beav. 194.
(4) 6 H. L. C. 616. [illegible]

The LORD JUSTICE GIFFARD:—No; I only declare them to be a continuing charge on the rents and profits.

Mr. *Greene* then submitted that the continuing annuity ought to be paid before the arrears.

The LORD JUSTICE GIFFARD:—The annuities were all payable *pari passu.* The arrears must first be paid rateably, and then the annuities.

Solicitors: Messrs. *Kingsford & Dorman*; Messrs. *Weir & Robins.*

Ex parte BARBER. *In re* BARBER.

L. J. G.
1870
June 11.

Partnership Articles—Purchase of Share of deceased Partner—Mode of taking Partnership Accounts.

Partnership articles provided for a balance-sheet being made out up to the 31st of December in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided that a like account should be made out on the 31st of December next after the death of a partner, and that his executors should be entitled to receive by six instalments from the surviving partners the value of his interest as appearing from such balance-sheet. The uniform practice of the firm in making out their balance-sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In the year 1864 one of the partners died; and, after the balance- sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure since the 31st of December, 1864, of debtors to the firm, and depreciation of consignments, which, when the balance-sheet was made out, had not been realized:—

Held (reversing the decision of the Registrar) that the executors of the deceased partner were entitled to receive the value of his share as appearing by the balance-sheet without any deduction for the losses subsequently ascertained.

THIS was an appeal by the executors of *James Barber* from a decision of Mr. Registrar *Roche* that they were not entitled to receive the value of *James Barber's* share in a business as ascertained by the last stock-taking, but must allow for losses subsequently ascertained. The special case on which the decision was given stated that *James Barber, J. Cundy,* and *J. Gillespie* entered into partnership on the 13th of July, 1859, under articles containing the following clauses:—

"11. On the 31st of December, 1859, and on the 31st of December in every succeeding year during the continuance of the said co-partnership, or within eight weeks from such days respectively, a full, true, and general account and rest in writing, or balance-sheet, of all and singular the effects, moneys, credits, debits, profits, losses, expenses, and charges of and belonging to the said co-partnership, and of all matters and things relating thereto, shall be made up and settled and signed by and between the said partners so far as the same can then be ascertained, and so that such account may contain all essential particulars relating to the said business; and the same shall remain open for the examination of each of the said partners for the space of one calendar month next after the signing thereof, after which time the same shall not be reopened, unless some manifest error to the amount of £100 shall be discovered therein, and then only for the purpose of rectifying such error."

"18. If any one of them, the said *James Barber, James Cundy*, and *John Gillespie*, shall die on the 31st of December in any one year during the continuance of the said co-partnership, the interest of the partner so dying in the said co-partnership business shall cease on the day of his death; but if any one of such partners shall die during the said co-partnership on any other day than the 31st of December, then the interest of the deceased partner, or of his representatives, or estate, in the said co-partnership business shall continue up to the 31st of December following.

"19. On the 1st of January next after the death of any of the said partners a new set of books shall be opened by the surviving partners, which shall be confined to the partnership transactions from that time; and all entries relating to the business of the said co-partnership previous to that day, and no other entries, shall be made in the old books; and as soon as conveniently may be after the said 31st of December on which such partner shall die, or next following the death of the partner so dying if he shall die on any other day (as the case may be), a general account shall be made up and stated by the surviving partners similar to the annual account hereinbefore provided for, or as near thereto as circumstances will admit; and such account shall be delivered by the sur-

L. J. G.
1870
Ex parte
BARBER.
In re
BARBER.

viving partners to the executors or administrators of the deceased partner, and such account shall state and distinguish the amount of the deceased partner's share of the profits of the said business during the current year in which he shall so die; and a sum of money equivalent to one moiety, or equal half part, of the amount which, by the general account so made up as last aforesaid, shall appear to have been the deceased partner's share of the profits of the said co-partnership business for the whole year in which his death shall occur, shall be added to the amount which, by such last-mentioned general account or rest, shall be standing to the credit of the said deceased partner for his share of the capital and profits of the said co-partnership; and the total amount, after making such additions as aforesaid, shall be paid by the surviving partners to the executors or administrators of the deceased partner by six half-yearly payments, commencing from the day of such death, or the 31st of December next after such death (as the case may be); and the surviving partners shall, within six weeks next after the day of such death, or next after the said 31st of December immediately following such death (as the case may be), furnish to the executors or administrators of the deceased partner an account of the capital of the deceased partner; and for the due payment of such instalments and interest as aforesaid the surviving partners shall, within three calendar months after the day of such death, or the said 31st of December next succeeding the death of such partner (as the case may be), give to the executors or administrators of the deceased partner the joint and several bond of the surviving partners for the payment of such moneys and interest; such payment to be made in full satisfaction of all claims and demands of the executors or administrators of such deceased partner on the surviving partners, or the co-partnership estate and effects, in respect of the share and interest of the deceased partner in the said co-partnership, and the capital, effects, and goodwill thereof."

Some changes took place in the constitution of the firm, but the partnership continued to be governed by the above articles. On the 7th of September, 1864, *James Barber* died. The business was thenceforth carried on by the surviving partners, *Cundy*, *James Stewart*, and *B. C. Barber*, until they stopped payment. On the 10th of October, 1867, they executed a deed of inspectorship, under which the estate was to be wound up as in bankruptcy. After the death of *James Barber* the books of the firm were balanced in the usual way up to the end of the year in which he died, and upon closing the account there stood to the credit of *James Barber* on his capital account the sum of £16,762, and on his drawing account the sum of £2752. It appeared from the balance-sheet that the assets of the firm at that time consisted mainly of moneys owing in respect of advances made by them on consignments not then fully realized, and of unsecured debts due from various persons on open accounts. The accounts, made up to the 31st of December, 1864, were never delivered to the executors of *James Barber*, nor were they ever finally settled and signed as between the surviving partners and the executors; but *B. C. Barber*, who was one of the executors, had access to the books, and knew what appeared in them, and in the accounts so made out.

The special case contained the following statements:—

"11. It was the practice of the said *James Barber & Co.*, after the date of the said articles of partnership, and during the lifetime of the said *James Barber*, to keep regular books of account, and to record their transactions therein in proper mercantile form upon the system of double entry, and to balance such books up to the 31st day of December in each year, and in an account called 'The Profit and Loss Account' it was their practice to enter the profit and loss made during the year, and to calculate the balance of profit which it was considered might be divided amongst the partners according to their respective interests therein. It was also the practice of the said *James Barber & Co.*, in pursuance of the 11th clause of their said articles of partnership, to abstract from their said books, and make up, a balance-sheet shewing the amount of the effects, moneys, credits, and debits on the 31st of December in each year, and another account shewing their profits, losses, expenses, and charges during the year, the balance of which last account was the amount so divisible as aforesaid; but such balance-sheet and account so made up from time to time were not on any occasion formally settled by and between the said partners, but the same, and the books of account from which they were abstracted, were open to the inspection of all the partners, and each was well acquainted with the contents thereof, and they were always treated as settled, except as hereinafter appears in paragraph 12A.

"12. In their said books of account a distinct capital account and a drawing account were opened for each of the partners, and each partner's respective share of profit, so calculated as aforesaid, was carried to the credit of his drawing account, and all moneys which the firm might from time to time receive on his behalf were credited in such account, and the same account was debited with all moneys drawn out by such partner, or paid on his behalf, during the year, and the balance appearing to be due to or from such partner on such account at the end of the year was duly calculated and stated therein.

"12A. The amount of profit so calculated from year to year as aforesaid was not at any time altered in consequence of any error having been discovered therein; but if any asset of the firm which had been dealt with as a good asset in calculating any year's divisible profit as aforesaid was afterwards ascertained to be doubtful or bad, it was the practice of the firm to carry the same to the debit of the Profit and Loss Account of the year in which it was discovered, thereby diminishing the divisible profits of that year. For instance, in the year 1858, when the gross profits of the business for that year amounted to £11,357 3*s.* 3*d.*, and, after debiting the sum of £1810 5*s.* 7*d.* for charges in trade and other matters, there remained a sum of £9546 17*s.* 8*d.* as the profits of that year, that sum was further reduced by the sum of £8704 12*s.* 6*d.*, leaving as the net profits divisible amongst the partners the sum of £842 5*s.* 2*d.*, in consequence of which the partners, having by their current drawings during the year taken out a sum exceeding their share of profits, had to transfer from their capital accounts to their drawing accounts sufficient to make up the deficiency, and *James Barber* so transferred £1846 19*s.*, and the other partners in proportion."

"17. Since the accounts of the 31st of December, 1864, were so made up as aforesaid, some of the assets due to the said firm at that time, and which, in calculating the amount of divisible profit as aforesaid, were considered as good assets, have been ascertained to be irrecoverable, in consequence of the failure, before and since the accounts were made up, of persons then indebted to the said firm, or of depreciations in the value since that time of consignments which had not then been realized."

The question was, whether the executors of *James Barber* were entitled to payment in full of the sums which appeared in the books of the firm to be standing to his credit on the 31st of December, 1864, together with an additional sum equal to one-half of his share of the profits shewn by the books of that year, without reduction on account of the above loss. It was admitted at the Bar that none of the failures mentioned in clause 17 had occurred before the 31st of December, 1864.

Mr. Registrar *Roche* decided that a deduction must be made for the losses, and from this *James Barber's* executors appealed.

Mr. *Cotton*, Q.C., and Mr. *Lindley*, for the Appellants:—

The articles do not define how the annual account is to be taken. The parties, therefore, are bound by their course of practice. It is against the spirit of the articles to have a valuation made in a new way for the purpose of paying out the executors: *Coventry* v. *Barclay* (1).

Mr. Serjeant *Sargood*, and Mr. *Ferrers*, for the Respondents:—

We should not contend that if the assets had consisted of chattels the selling price of which had fallen after the 31st of December, 1864, the executors of the deceased partner would have been affected by the fall. But as to transactions entered into before the close of the year, each partner ought to bear his share of the loss. Clause 19 of the articles, which provides for keeping open the old books, must have intended that all new transactions relative to the old contracts should be entered in them. This is not a case of buying out a partner, but of ascertaining the value of a deceased partner's share, and it should be ascertained fairly. In the ordinary course of the partnership such things were set right in the next year. The course under clause 11, which relates to accounts during the continuance of the partnership, does not rule that under clause 19, which relates to a dissolution.

SIR G. M. GIFFARD, L.J.:—

It appears from the statements of the special case that the partners, from the commencement of this partnership, followed a

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(1) 33 Beav. 1; 3 D. J. & S. 320.

L. J. G.
1870
Ex parte BARBER.
In re BARBER.

uniform course in making out their yearly accounts. The clauses 11, 12, and 12A of the special case are the material ones on the point. From the last of these clauses it appears that "if any asset of the firm which had been dealt with as a good asset in calculating any year's divisible profit, was afterwards ascertained to be doubtful or bad, it was the practice of the firm to carry the same to the debit of the Profit and Loss Account of the year in which it was discovered, thereby diminishing the divisible profits of that year"—*i.e.*, of the year in which the loss was discovered. Now a course of constant dealing puts a construction upon anything which is doubtful in the articles. *Coventry* v. *Barclay* (1) does not decide the present case, for the articles there were very different; but it shews the effect to be given to a uniform course of practice. Now, taking first the 19th clause of the articles, we find that after the death of a partner an account was to be made up in the same way as the ordinary annual account (the taking of which is provided for by clause 11), and what is found due to the estate of the deceased partner is to be paid by six instalments; for the due payment of which a bond is to be given within three months from the time to which the account is to be made up. When this bond is given the representatives of the deceased partner have no further connection with the concern except as creditors. If we then turn to clause 11, we find that the balance-sheet was to contain a full account of all the assets and dealings of the firm, but the principle on which it was to be made out is not further defined. Now the uniform course of the partners was, that if in the course of the current year a loss was discovered it was attributed to that year. Thus, if a heavy loss had been discovered in the year in which *Barber* died it would, according to the course of dealing, have been attributed to that year—so diminishing what his executors would have to receive. The partners stood on an equal footing as to this, each took his chance as to whether he should lose or gain by this particular way of keeping the accounts, and the rights of the representatives of the deceased partner must be determined according to the balance-sheet made out in the usual way.

The only other matter that need be noticed is clause 17 of the special case. Depreciation of assets since the 31st of December, 1864, is clearly not to be regarded. The failure of debtors of the

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(1) 3 D. J. & S. 320.

L. J. J.
1870
Ex parte BARBER.
In re BARBER.

firm whose debts were then supposed to be good, deserves more consideration. But before I could interfere with a balance-sheet settled by the parties I must have a statement that there had been a mistake made by entering in it what ought not to have been entered. Suppose, for instance, that the actual loss of a debt due to the firm had been ascertained before the balance-sheet was made out, and yet this debt had been entered in it as an asset, that would have been a mistake which must have been corrected; but nothing of that kind is shewn. There must, therefore, be a declaration that the executors were entitled to the value of *James Barber's* share, as ascertained by the stock-taking, according to sect. 19, without any deduction for losses subsequently ascertained. There will be no costs given, as the question is one of difficulty.

Solicitors: Messrs. *Hill, Son, & Heald*; Messrs. *Markby & Tarry.*

L. J. J.
1870
July 22.

In re HEATHER.

Solicitor—Taxation—Amending Bill after Delivery.

A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid the taxation of the bill by withdrawing it and delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations, which were partially acquiesced in.

THIS was an appeal from a decision of the Master of the Rolls.

Messrs. *Heather, Son, & Gill* were the solicitors for a building society, which held a mortgage on certain leasehold houses belonging to Mr. *J. Martin.* After Mr. *Martin's* death, on the 18th of February, 1870, the solicitors of his administrators, Messrs. *Pritchard & Sons,* sent a cheque for £166 17*s.* 11*d.*, the amount due for the mortgage-debt and interest, to Messrs. *Heather*, who declined to accept it or to deliver up the deeds until their bill of costs relating to the mortgage was paid. On the 14th of April, 1870, Messrs. *Heather* sent their bill of costs to Messrs. *Pritchard*, amounting to £83 16*s.* 10*d.* Messrs. *Pritchard*, on examining the bill, considered that some of the items were improperly charged to their clients. They therefore altered the bill in pencil, striking out these items, and thereby reducing the bill to £47 6*s.* 4*d.*, and sent it back to Messrs. *Heather* on the 21st of April, 1870, with a letter, in which they said:—

"We return the mortgagees' costs against the administrators, the payment of which you require before delivering up the title-deeds of the property. We have gone through the bill, and taken off in pencilling what, as it appears to us, the administrators are not liable to pay, and the result is that the bill is thus reduced to £47 6*s*. 4*d*. We are, of course, prepared to consider any observations you may wish to make with reference to any of the items taken off, and we shall be glad to hear from you in the course of two or three days upon the subject, by which time we expect you will return us the bill."

No answer having been returned to this letter, Messrs. *Pritchard* wrote again on the 27th of April, as follows:—

"Unless we hear from you in the course of to-morrow in reply to our letter of the 21st instant, we must assume that you decline to agree to our deductions in the bill of costs of the mortgagees. We cannot allow the matter to remain open any longer, as we have been trying for months to have it settled and the deeds delivered up, but without effect. In any case, we shall expect to have the bill returned by to-morrow."

A few days afterwards Messrs. *Heather* sent back the bill of costs, with pencil marks, signifying their agreement in some of the alterations, but not in others.

On the 10th of May Messrs. *Pritchard* wrote again, adhering to their first alterations.

On the 20th of May Messrs. *Heather* asked for the loan of the original bill of costs, and on the 27th of May they sent in a fresh bill, in which some of the items objected to were omitted, and the total amount reduced to £57 17*s*.

Messrs. *Pritchard*, however, refused to accept this amended bill; and after some further correspondence they obtained an order to tax the original bill for £83 16*s*. 10*d*.

On the 30th of June Messrs. *Heather* applied to the Master of the Rolls for an order to discharge the order for taxation, which the Master of the Rolls refused. Messrs. *Heather* now renewed the application before the Court of Appeal.

L. J. J.
1870
In re HEATHER.

Mr. *Freeling*, for the Appellants:—

We admit that, after an order for taxation under the *Solicitors' Act*, or even after a threat of taxation, a solicitor cannot withdraw a bill which he has delivered; but, before such a proceeding is threatened, he is justified in amending his bill; and, indeed, it is his duty to do so if objections are made to any of the items. If it were not so, a solicitor, through a mere mistake, might be subjected to costs, although he is perfectly willing to correct the mistake. In the present case the other solicitors invited Messrs. *Heather* to amend their bill. It must, therefore, be considered to have been amended with their consent, in which case it is always admitted that the original bill cannot be taxed: *In re Catlin* (1); *Davis* v. *Earl of Dysart* (2). And even where there has been no consent, an amended bill is allowed where there is a *bonâ fide* desire to correct a mistake: *Loveridge* v. *Botham* (3); *In re Chambers* (4). In the present case there was no intentional overcharge. The items objected to related to business which had been actually done; but the retainer of the solicitors was questioned. Where, as in this case, the costs are chargeable to a third party, there must at first necessarily be a doubt as to some of the items.

Mr. *Chitty*, for the Respondents:—

The rule that, in cases of taxation under the *Solicitors' Act*, a solicitor must abide by the bill which he has delivered, is clearly laid down in *In re Carven* (5), and has been always acted on. In *In re Chambers* there were special circumstances. The marginal note is too general, and not justified by the report. To allow a solicitor to withdraw a bill after having ascertained the extent of his client's objections, and then to substitute another so as to avoid the costs of the taxation, would be offering a premium to speculative charges.

Mr. *Freeling*, in reply.

SIR W. M. JAMES, L.J.:—

There may be some hardship to the solicitors in this case, having regard to the fact that they were requested to amend their bill;

(1) 18 Beav. 508, 519.

(2) 21 Ibid. 124, 132. 1 Jur. N.S. 1152

(3) 1 B. & P. 49.

(4) 34 Beav. 177. 7 Jur. N.S. 230

(5) 8 Beav. 436.

and there may be a reason for the apparent overcharge in the explanation suggested that some things, for which charges were made, were things done without a proper retainer; but the Court must deal with the matter with reference to the general rule in ordinary cases. And I confess that I am glad that the result of this discussion has been to satisfy me that the judgment and order of the Master of Rolls are free from technical objection, as they are consistent with the interests of justice. Such a case as this may very well happen. A mortgagor whose deeds are in the possession of the mortgagee, feeling himself very much at the mercy of the mortgagee, wishes to pay off the mortgage and get the deeds out his hands. The mortgagee's solicitor says, "You must pay my bill before you can do so." The solicitor, in such a case, is very much tempted to introduce into his bill a great many charges to which he is not strictly entitled. The mortgagor is minded to question the bill of costs. He knows that the solicitor has so committed himself that, if he has the bill taxed, he is sure of the costs. The moment the bill was delivered the mortgagor acquired the right to have it taxed; but his solicitor, instead of taking advantage of that right, with the comity which ought always to exist between professional men, says, "I have looked through the bill, and find many improper charges; but if you are satisfied to take so much in full payment, I will advise my client to pay that sum and not to have the bill taxed." Then the mortgagee's solicitor is tempted to say, "If I can so alter the bill as just to avoid taxation, I will do so. I know now what objections will be made. I cannot sustain all the charges of my original bill, but I am sure of £47 at least; I will put on so much more as will leave me safe against the costs of taxation, and, if it is attempted, I shall have the profit of conducting the business." I do not say that the solicitors in this particular case reasoned in this way, but such a case is very likely to happen.

I am glad, therefore, that the Master of the Rolls has made such a course of proceeding impossible. I am of opinion that his judgment was right, technically, substantially, and morally. The appeal, therefore, must be dismissed with costs.

Solicitors: Messrs. *Heather, Son, & Gill*; Messrs. *Pritchard & Sons*.

L. J. J.
1870
July 9.

10 Ch. D. 94
21 Ch. D. 298
36 D
2 Ch. D. 355-6
3 Ch. D. 224

In re WHITE, A PERSON OF UNSOUND MIND.

Trustee Act, 1850, *ss.* 5, 24—*Lunatic Co-Trustee—Vesting Order.*

One of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything :—

Held, that an order could be made vesting the right to transfer the shares in the persons beneficially entitled.

UNDER the trusts of a settlement, dated the 20th of November, 1828, made on the marriage between *Thomas Nicholl* and *Maria Kett*, both since deceased, *Ellen Nicholl* and *Maria Nicholl*, the two children of the marriage, became absolutely entitled to the trust funds in equal shares, subject to the life interest of their father. *Ellen Nicholl* died in 1853, and the father in 1867. *Esther Gole* had become entitled to the share of *Ellen Nicholl*, by representation, through the father.

The surviving trustee of the settlement was *Edward Downes*, who died in 1863, leaving a will and codicil appointing four executors, all of whom proved. The three survivors were *Philippa F. Downes*, *Charles White*, and *E. W. Stanley*. *Charles White* had become of unsound mind, though not found so by inquisition.

Part of the trust property consisted of four *Oxford Canal* shares. *Esther Gole* and *Maria Nicholl*, by writing, requested *P. F. Downes* and *E. W. Stanley* to transfer the shares to them, but they neglected to do so for more than twenty-eight days, and declined to take any step in the matter.

Esther Gole and *Maria Nicholl* accordingly presented a Petition, intituled, In Lunacy and Chancery, asking that the right to transfer two of the shares might be vested in *Esther Gole*, and the right to transfer the other two in *Maria Nicholl*.

Mr. *E. Cutler*, for the Petitioner, referred to the *Trustee Act*, 1850, ss. 5 and 24; and *Ex parte Bradshaw* (1).

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(1) 2 D. M. & G. 900.

L. J. J.
1870
In re WHITE.

21 Ch D. 30

SIR W. M. JAMES, L.J. :—

The order asked for is not within the strict letter of the Act. As, however, under the terms of the Act, an order might be made vesting the right to transfer the shares in the trustees who are of sound mind, and then, by a second order, that right might be vested in the Petitioners, on the ground of the refusal of the sane trustees to act, I think that I shall not be exceeding the powers of the Act in avoiding this circuity, and making the order as prayed.

Solicitors:—*J. & R. Gale.*

In re FROST, A PERSON OF UNSOUND MIND.

L. J. J.
1870
July 9.

Lunacy—Allowance to Next of Kin.

Weekly allowances ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision.

THIS was a Petition by the committee of the estate asking, among other things, for allowances to some of the poor relatives of the lunatic.

By a report of the Master in Lunacy, dated the 23rd of April, 1869, it was found, among other things, that, so far as the Master was able to ascertain, *John Miller, Thomas Miller, Mary Ann Hayes, Frances Chamberlain, Ann Green,* the Petitioner *Thomas Bailey,* and *Ann Anderson,* were some of the lunatic's nearest relatives, and supposed cousins and next of kin, and that, having regard to the circumstances therein proved, he had deemed it inexpedient that, for the present, the inquiry as to the lunatic's next of kin should be prosecuted, and he approved of the Petitioner *Thomas Bailey* as the proper person to be appointed committee of the estate.

No other persons had come in to prove themselves next of kin, though the usual advertisements had been issued.

The lunatic was a maiden lady aged fifty-nine. She was possessed of considerable real estate, and of personalty to the value of more than £70,000. Her whole income was about £4500. A scheme had been settled, allowing £620 per annum for her maintenance, and it appeared that no increase of that allowance would make her more comfortable.

John Miller was a butcher's assistant, aged sixty-one, and had an income of £1 9*s.* 6*d.* a week, chiefly arising from his labour. *Thomas Miller* was a labouring lead-worker, aged fifty-nine, with a wife and family, and earned £1 per week, which was his only income. *Mary Ann Hayes* was of the age of fifty-four years, and her husband was a stocking-maker, with no income except his earnings, which did not exceed 25*s.* per week. *Ann Anderson* was of the age of fifty-three years, and her husband was a journeyman tailor, earning 13*s.* 6*d.* per week.

During the joint lives of the lunatic and her mother they lived together, and treated their incomes as a common fund. They made weekly allowances of 5*s.* apiece to *Samuel Miller* (the father of *John Miller*, *Thomas Miller*, and *Mary Ann Hayes*), to *Ann Bailey* (the mother of the Petitioner and of *Frances Chamberlain* and *Ann Green*), and to *Charles Miller* (the father of *Ann Anderson*); and such allowances were regularly paid to them for more than twenty years, and up to the time of their respective deaths.

Thomas Miller had a conversation with the lunatic's mother, some time before her death, as to making some provision for her nephews and nieces, and she told him she should make some provision for them at her death, and that when she died all her nephews and nieces should have equal shares to a farthing, and she hoped that they would all take care of it as she had done, and that it would do them all good.

After the death of the lunatic's mother, and the day before the funeral, *Thomas Miller's* wife visited the lunatic at her residence. and in conversation said she hoped her aunt had not died without making a will; and she reminded the lunatic of her mother's promise to make some provision for her nephews and nieces, in answer to which the lunatic said she had not done so. Mrs. *Miller* then said to the lunatic, "As my aunt is now dead she cannot carry out her promise, but you may do so; and as they are your nearest relatives, and all in the downhill of life, I hope you will think of them." Whereupon the lunatic stated she had no objection to making them a handsome present that would make them comfortable in their old age, but she must have time; Mrs. *Miller* answered, "I suppose, cousin, you mean after my aunt's funeral is settled down?" to which the lunatic replied, "Just so." The incapacity of the lunatic manifested itself within a month from this conversation.

A state of facts was carried in before the Master in Lunacy by the next of kin, who proposed that, having regard to the wealth of the lunatic, and to the expectations of the relatives in the event of her death, allowances should be made to them as follows:—

	£	*s.*	*d.*	
John Miller	1	0	0	per week.
Thomas Miller . . .	1	10	0	„
Mary Ann Hayes . . .	1	10	0	„
Frances Chamberlain . .	1	10	0	„
Ann Green	1	10	0	„
Ann Anderson . . .	1	10	0	„
	£8	10	0	„

The Master was inclined to grant the allowances, but thought it better to refer the matter to the Lords Justices, and, in his report of the 23rd of April, 1869, submitted to their Lordships whether the proposed allowances should be made out of the large surplus of the lunatic's estate, which surplus, as he stated, it was estimated would amount to not less than £3700, after making provision for maintenance, and the allowances therein mentioned.

In May, 1869, the above-mentioned relatives, except *J. Bailey*, presented a Petition for confirmation of the report, and asking for the above allowances to be made; and it was shewn that the lunatic had, before her lunacy, made the allowances to Mrs. *Chamberlain* and Mrs. *Green*, and also an allowance to a Miss *Knight*. By the order dated the 28th of May, 1869, made on this petition, the allowances to Miss *Knight*, Mrs. *Chamberlain*, and Mrs. *Green* were continued, as also certain payments to charities to which the lunatic and her mother had subscribed, but no order was made as to the other allowances asked for.

A physician, who had been instructed by the Master to visit and

L. J. J.
1870
In re FROST.

examine the lunatic, reported on the 14th of January, 1870, that her case was, as he feared, incurable.

The present Petition, setting forth more fully the circumstances shewing the lunatic's intention before her insanity to do something for her poor relatives, asked that, having regard to the old age and impoverished circumstances of *John Miller, Thomas Miller, Mary Ann Hayes,* and *Ann Anderson,* and to the circumstances and estate of the lunatic, and the large and accumulating yearly surplus income, and to the expectations of the relatives, and also to what, as the Petitioner believed, the lunatic herself would have done, the Petitioner might be at liberty to pay to *John Miller, Thomas Miller, Mary Ann Hayes,* and *Ann Anderson* respectively the weekly allowances thereinbefore mentioned out of the income of the lunatic's property, and that such allowances might commence from the 19th of April, 1870.

Mr. *Southgate,* Q.C., and Mr. *Chitty,* for the Petitioner, referred to *In re Croft* (1).

Mr. *Glasse,* Q.C., and Mr. *Locock Webb,* for the other cousins.

Mr. *L. Field,* for the former solicitor of the lunatic, who had been directed by the Master to attend the proceedings, on account of his intimate acquaintance with the lunatic's affairs.

SIR W. M. JAMES, L.J.:—

In this case it appears highly probable that if the alleged cousins do not establish their claim to be next of kin no one else will. Considering this, and considering their poverty, the evidence of the intention of the lunatic to do something for them, and the amount of her income, which far exceeds anything that can ever possibly be required for her own wants, I think that I may venture to make the order asked, which will do no more than what the lunatic herself probably would have done had she continued sane. Whatever they receive will be taken into account against anything to which they may ultimately become entitled as next of kin of the lunatic.

Solicitors: Messrs. *Aldridge & Thorn*; Mr. *G. Cheatle.*

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(1) 32 L. J. (Ch.) 481.

Ex parte CAMPBELL. *In re* CATHCART.

L. J. J.
1870
July 9.

Bankruptcy Act, 1861, *s.* 216—*Examination of Witness.*

L R 10 Ch 9
18 Ch D 35,
23 Ch D 39
394

A witness who was being examined under the *Bankruptcy Act*, 1861, s. 216, was asked where the bankrupt's father was residing. The witness, who was the father's solicitor, declined to answer, and stated that "the place of residence of my said client came to my knowledge in my professional capacity, and in the course and in consequence of the professional employment in which I was engaged on his behalf, and in no other way":—

Held (affirming the decision of the Registrar), that the witness had not made a case for excusing himself from answering on the ground of professional privilege:

Held, also, on the authority of *Ex parte Vogel* (1), decided under 5 Geo. 2, c. 30, s. 16, that the question was one which was authorized by the Act.

Where a clause in an Act of Parliament which has received a judicial interpretation is re-enacted in the same terms, the Legislature is to be deemed to have adopted that interpretation.

THIS was a motion by *Arthur Campbell* to discharge an order of Mr. Registrar *Spring-Rice*, disallowing an objection taken by him to answering a certain question put to him by the Sheriff-substitute in *Edinburgh*, and remitting the matter to the sheriff that he might proceed with the examination.

R. A. E. Cathcart having been adjudicated a bankrupt, an order was made, dated the 23rd of February, 1870, by which, after reciting that it appeared that *James Wilkie* and *Arthur Campbell*, both of *Edinburgh*, were persons believed to be capable of giving information with regard to the estate and dealings of the bankrupt, it was ordered that they should be examined in *Scotland* touching such matters, and that such examination should be taken before the sheriff of the county of *Edinburgh*.

Campbell, on being examined, stated that he was acquainted with the terms of a trust disposition made in 1865 by Sir *John Cathcart*, the father of the bankrupt, and that under it the bankrupt was entitled to an annuity. After some other questions relating to property, he was asked, "Where is Sir *John Cathcart* residing at present?" The witness, who was a writer to the signet, declined to answer this question on the ground of professional confidence, the objection being thus stated by him in an affidavit:—

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(1) 2 B. & A. 219.

L. J. J.
1870
Ex parte CAMPBELL.
In re CATHCART.

"I am the law-agent in *Scotland* for Sir *J. Cathcart*, and I am now acting for him in the management of his affairs and the transaction of his law business. The place of residence of my said client, the said Sir *J. Cathcart*, came to my knowledge in my professional capacity, and in the course and in consequence of the professional employment in which I was engaged on his behalf, and in no other way."

The affidavits shewed that in *Scotland* a writer to the signet stood in the same position, with regard to professional confidence, as a solicitor in *England*.

The objection having been reported for the decision of the Court of Bankruptcy, the Registrar made the order under appeal.

Mr. *De Gex*, Q.C., and Mr. *G. W. Lawrance*, for the Appellant:—

This examination takes place under the Bankruptcy Act, 1849, s. 122, and a question like this is not warranted by the terms of that section: *Ramsbotham* v. *Senior* (1); *Ex parte Alexander* (2). The Court will not allow such a question to be put unless it is shewn to be material to a discovery of the bankrupt's property.

Mr. *Winslow*, and Mr. *Finlay Knight*, for the assignee in support of the order:—

We want to obtain discovery of the bankrupt's property in *Scotland*, and we are taking what we consider the most effectual means to that end. The examination is under the *Bankruptcy Act*, 1861, s. 216; and in *Ex parte Vogel* (3), it was decided that a section in almost the same terms authorized a question of this kind.

Mr. *De Gex*, in reply:—

As Lord *Westbury* says, in *Ex parte Alexander*, there must be some limit to the questions to be asked. The only case referred to against us related to a wife, who might be presumed to know something about her husband's property.

SIR W. M. JAMES, L.J.:—

I am of opinion that the objection to answer fails on both grounds. The first ground taken is, that the residence of the

(1) Law Rep. 8 Eq. 575.
(2) 1 D. J. & S. 311.
(3) 2 B. & A. 219.

L. J. J.
1870
Ex parte CAMPBELL.
In re CATHCART.

bankrupt's father is only known to the witness because he is the solicitor (or rather the writer to the signet) or professional adviser of the father. That is not sufficient, according to my view of the law, to protect the solicitor from answering. What a solicitor is privileged from disclosing is that which is communicated to him *sub sigillo confessionis*—that is to say, some fact which the client communicates to the solicitor for the purpose of obtaining the solicitor's professional advice and assistance; the principle being, that such communications ought to be privileged, because otherwise a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. But a solicitor's knowledge of his client's residence, even though he knows it simply in consequence of the professional business in which he has been acting for him, is not on that ground alone a matter of confession, so as to be in the nature of a privileged or confidential communication. The solicitor may know it because the client said, "I have got a lease to execute—you must send it me there and I will execute it," or because he may have received letters, dated from such a place, telling him where he may see him for the purpose of making a communication. The client's place of residence in such a case is a mere collateral fact, which the solicitor knows without anything like professional confidence; and therefore the mere statement, "The place of residence of my client came to my knowledge in my professional capacity, and only in consequence of my employment as his solicitor," is not, to my mind, nearly enough to warrant the solicitor in refusing to answer the question as to where his client is residing. If, indeed, the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said, "I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world," then the client's residence would have been a matter of professional confidence; but the mere statement by the solicitor, that he knows the residence only in consequence of his professional employment, is not sufficient.

Then the second ground is, that the question is not one con-

L. J. J.
1870
Ex parte CAMPBELL.
In re CATHCART.

cerning the profession, trade, dealings, or estate of the bankrupt. It certainly is difficult to bring it within the words of the Act of Parliament, but the very same words were used in 5 Geo. 2, c. 30, s. 16, and the Court of Queen's Bench, in *Ex parte Vogel* (1), put upon them a very salutary construction, which I am glad to follow: for it would be absurd, if, where you have to inquire as to the dealings and estate of a bankrupt, you were not allowed to ask the residence of the person who is most likely to be able to give information about them. Suppose that *A. B.* is known to have been present when a murder was committed and cannot be found, but *C. D.* knows where *A. B.* is, surely a magistrate would not have the slightest hesitation in compelling *C. D.* to come before him and tell him where *A. B.* was? So here it is wished to know where the father is, that he may be summoned to give evidence. It is said that the result may be the torturing of the father by questions regarding the son's dealings and transactions, but the law allows that torture to be practised, and, notwithstanding Lord *Westbury's* disapprobation, the law has remained the same—the clause having been imported into the Act of 1861 without any modification. I must therefore assume that the Legislature, notwithstanding Lord *Westbury's* objection, has thought fit to maintain this power of examination as far more likely to do good than to do harm—has considered it better to press persons to appear as witnesses in a Court of Justice, than to give fraudulent persons the chance of escaping the consequences of their frauds. Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them. I consider, therefore, that the Legislature, in repeating these words in the Act of 1861, must be taken to have adopted the meaning put upon them by the Court of Queen's Bench. I am of opinion, therefore, that both grounds of objection fail.

Solicitors: Messrs. *Shoubridge;* Mr *E. F. Davis.*

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(1) 2 B. & A. 219.

In re UNITED SERVICE COMPANY.

HALL'S CASE.

L. J. J.
1870
July 8, 12.

13 Eq 230
10 Ch D 24
5 Ch D 52
536
17 Ch D 81

Company — Contributory — Subscriber of Memorandum —Surrender of Shares before entry on Register—Director—Indemnity against past Calls—Ultrà vires act—Dealing in Shares.

H., one of the directors of a company, subscribed the memorandum of association for 500 shares, but only 250 were allotted to him. The articles of association, among other clauses relating to forfeiture, gave power to the directors to accept from any shareholder the surrender and forfeiture of his shares. The company were expressly prohibited from dealing in shares. The directors agreed to release *H.* from all liability with respect to the 250 shares not allotted to him; and a deed was executed and sealed with the company's seal, and approved at a general meeting of shareholders, by which *H.* was released from all future calls, and indemnified against all past liability in respect of those shares. Afterwards the company was wound up:—

Held (affirming the decision of the Master of the Rolls), that the deed of release and indemnity was not an acceptance of a surrender and forfeiture under the articles, but was a dealing in shares by the company, and, as such, was *ultrà vires* on the part of the directors and the company; and, consequently, that *H.* must be on the list of contributories for all the shares for which he had signed the memorandum of association.

Snell's Case (1) distinguished.

THIS was an appeal from an order of the Master of the Rolls made in the winding up of the *United Service Company, Limited.*

The company was formed in 1865, with a nominal capital of £1,000,000, divided into 100,000 shares of £10 each. The memorandum of association was subscribed by General *Hall,* who was one of the first directors, and by four others, for 500 shares each, and by two others for a smaller number. Only 250 shares were, however, allotted to General *Hall.*

The 37th to the 46th clauses of the articles of association related to the forfeiture of shares. The 42nd clause provided that any member whose shares were forfeited should, notwithstanding the forfeiture, be liable to pay to the company all calls owing upon the shares at the time of the forfeiture. The 46th clause was as follows: "The directors may, if they think proper, at any time accept from any member the surrender and forfeiture of any shares which he is desirous of surrendering and forfeiting."

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(1) Law Rep. 5 Ch. 22.

The 95th clause defined the powers of the directors, and the 19th sub-section of that article was as follows: "Nothing herein contained shall authorize the board to purchase or deal in any shares, and the company and the board are expressly prohibited from purchasing or dealing in such shares."

At a meeting of the directors of the company, held on the 7th of January, 1868, it was resolved that General *Hall* and the other persons who had subscribed the memorandum of association should by deed under the seal of the company be released from all future liability, and indemnified against all past liability in respect of the shares to which they might be entitled by reason of having subscribed the memorandum of association, and that such release should be submitted for the approval of an extraordinary general meeting of the company.

On the 18th of February, 1868, an extraordinary general meeting, specially summoned for the purpose, was accordingly held, when it was resolved that the proposed deed of release and indemnity be approved and confirmed, and that the directors be requested to affix to it the common seal of the company.

The deed of release, so approved, was accordingly sealed with the seal of the company. It was dated the 31st of March, 1868, and was made between the company of the one part, General *Hall* and others (being the persons who had signed the memorandum of association) of the other part, and after reciting the allotment of shares, and that the attention of the parties thereto of the second part had been drawn to recent decisions of the Court of Chancery on the liability of persons subscribing memorandums of association, and that they desired to have their position ascertained, and reciting the resolution passed at the meeting of the 18th of February, 1868, it was witnessed that in consideration of the release by the parties of the second part thereinafter contained, the said company did thereby release the said parties from all actions, claims and demands at law or in equity in respect or on account of their having subscribed the said memorandum of association, and did declare that the company and its estate would indemnify the said parties from and against all claims and demands which could be made against them respectively by reason of their having subscribed the said memorandum. And the said deed contained a release and renunciation of claim by the parties of the second part to the company in respect of any shares in respect of which they were not entered as proprietors in the company's register of members; and the same parties agreed to do and execute at the costs of the company all instruments and things necessary or proper to perfect the release, it being the intention of the parties thereto that the positions of the parties of the second part respectively towards the company should thenceforth be the same as it would have been if there had been registered in their respective names, as well as the number of shares for which they respectively signed the memorandum of association, as also the number of shares allotted to them, and they had respectively, upwards of a year before the execution of the deed, duly transferred all such shares except those of which they were then entered as proprietors on the register of members.

The company was subsequently ordered to be wound up, and the Master of the Rolls, on the application of the official liquidator, ordered that General *Hall's* name should be put on the list of contributories for 500 shares, so as to include the 250 shares which had not been allotted to him, as well as those which were registered in his name, his Lordship considering that the deed of release was beyond the powers of the company. General *Hall* appealed from this decision.

Mr. *Jessel*, Q.C., and Mr. *Chitty*, for the Appellant:—

The case is covered by *Snell's Case* (1). That case decided, first, that a power given to the directors by the articles of association to accept surrenders of shares is a good power; and, secondly, that shares may be surrendered, although not actually allotted and entered in the register. In the present case, if the deed of release had no other effect, it was a good surrender of the shares, for which no particular form is needed. With respect to the covenant to indemnify General *Hall* against the calls, the general meeting had power to do this. The effect was not to reduce the capital of

(1) Law Rep. 5 Ch. 22.

L. J. J.
1870

HALL'S CASE.

the company by extinguishing the shares, for the shares might be immediately re-issued.

Mr. *Roxburgh*, Q.C., and Mr. *Graham Hastings*, for the official liquidator:—

The 46th article stands in a group of articles which refer to forfeiture, and the words are "The directors may accept the surrender and forfeiture," shewing that the clause contemplated surrender on the occasion of a forfeiture, not surrender on any terms which the directors might make. In the present case there was no forfeiture, otherwise the shareholder would have been made still responsible for the calls. Neither the directors nor the general meeting had any power to release a shareholder on these terms. It was, in fact, to sweep off the whole amount of shares from the register, to reduce the capital of the company to that extent, and to throw all the liability of the extinguished shares on the other shareholders. *Hutton* v. *Scarborough Cliff Hotel Company* (1) lays down the principle that any resolution which places one body of shareholders on a different footing from the others is *ultrà vires*. That case was not cited in *Snell's Case* (2). But, in truth, *Snell's Case* is distinguishable from the present. In that case *Snell* had retired from the directorship, and the directors were bargaining with him at arm's length; but here General *Hall* was one of the directors, who were bargaining with one another without regard to the interests of the shareholders. We contend, therefore, that the release was void, and that there is nothing to take the case out of the authority of *Evans's Case* (3).

Mr. *Chitty*, in reply:—

If the clause indemnifying the Appellant against the calls was *ultrà vires*, the deed is divisible. The void part may be rejected, and it still will be good as a surrender of the shares.

SIR W. M. JAMES, L.J.:—

I am of opinion that this appeal cannot be sustained. I may be permitted to express my great regret that I am obliged to come to that conclusion, because I think the transaction, as far as regards these gentlemen, was one of the most honest and straightforward transactions ever submitted to the Court. Still, the Court must deal with it according to the general principles of law which govern these transactions. It appears that General *Hall*, and some other gentlemen, had subscribed the memorandum of association for a certain number of shares. Afterwards, not thinking that quite right, they applied for a smaller number of shares, and this number was allotted to them. It was held in *Evans's Case* (1), and there can be no doubt that upon principle it could not have been held otherwise, that a subscriber to the memorandum of association being a director, having entered into a contract to take a certain number of shares, is bound to see, in his character of director, that that contract is carried into effect as regards himself and the shareholders. These gentlemen were in the position of directors—of persons whose duty it was to put themselves on the list of shareholders for a certain number of shares. It is said, however, that being in the position of shareholders in equity, they had the same right to surrender as they would have had in case their names had been duly put on the register; and it is said it is impossible to distinguish this case from *Snell's Case* (2), in which there was a subscriber to the memorandum of association who was never put on the register, and who did make to the directors, and they accepted from him, a surrender of the shares which he ought to have had, but did not have allotted to him. Mr. *Roxburgh* has satisfied me that there is a very substantial difference between *Snell's Case* and this case. In *Snell's Case* there was this power in the deed: "The directors may, if they think fit, accept the surrender or forfeiture of his shares by any shareholder desirous of surrendering or forfeiting them on such terms as the directors may think fit;" and in that case Mr. *Snell*, having resigned his office of director, being nothing but a shareholder liable in respect of those shares, entered into a bargain with the directors, by which the directors did accept from him the surrender of his shares upon such terms as they thought fit. In this deed the power is contained in a series of clauses all relating to the forfeiture of shares, and which, after prescribing the circum-

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(1) 13 W. R. 631, 1059, 11 Jur NS 551, 849

(2) Law Rep. 5 Ch. 22.

(3) Law Rep. 2 Ch. 427.

(1) SC 4 De G J & S. 672

(1) Law Rep. 2 Ch. 427.

(2) Law Rep. 5 Ch. 22.

L. J. J.
1870
HALL'S CASE.

stances under which the forfeiture should be declared, and the requisite notices and other formalities, goes on, by way of final clause on that special subject, to say: "The directors may, if they think proper, at any time accept from any member the surrender and forfeiture of any shares which he is desirous of surrendering and forfeiting;" evidently having the idea of forfeiture in mind. Now the forfeiture of shares is a forfeiture to be accompanied by the condition that everything which is due in respect of the shares at the time of the forfeiture shall be paid by the member, who is not to be relieved from any liability whatever in respect of any forfeited shares.

In this case, therefore, all the calls upon these shares, all the original sums which ought to have been paid in respect of those shares, were due from all these gentlemen to the company at the time when the transaction took place which is alleged to have had the effect of a surrender. The deed that was made between those gentlemen and the company does not amount to anything like forfeiture of that kind. So far from being a forfeiture, it was a bargain by which they gave up all their rights to the shares in exchange for an indemnity which the company gave with respect to all past and future liabilities. It was, in truth, so far from being a surrender and forfeiture of shares, a dealing in shares from which the company by a special part of their deed were prohibited. They said, in truth, "Give us all the shares, give us the benefit of them, and we will indemnify you from past liability." It was, in fact, a transfer of shares to the company in exchange for the indemnity. That is a thing, in substance as well as in form, totally different from the surrender and forfeiture which was contemplated by the 46th article.

I am of opinion that that being so, it is impossible to read the deed as it is proposed to do, in two parts, and to hold that it amounts to a surrender, and to reserve the opinion of the Court to some future time, as to how far the deed is valid, so far as it purports to give indemnity and release. The whole thing was part of one bargain.

There is this distinction also between the present case and *Snell's Case* (1). There, it was a bargain with the directors by a person who

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(1) Law Rep. 5 Ch. 22.

L. J. J.
1870
HALL'S CASE.

was nothing but a member of the company, or a person liable to be a member. In this case the directors to whom this power was given in trust for the shareholders were the persons making the bargain one with another. Every one of these several directors was liable, in consequence of having signed the memorandum of association, and they came to a resolution to release themselves. That was not the object or intention of such a clause. The object of the 46th clause was, that if there was any member who was willing not to put them to the necessity of going through the form of notices, he was to be at liberty to do so.

The deed, therefore, as regards the directors, would have been *ultrà vires*. Is it at all better by being done by the company? I think not. The company can do nothing unless authorized by the deed. There is nothing in the deed to enable a general meeting to enter into bargains with individuals, such as has been made here, and it is in direct violation of the 19th article, which says the company is expressly prohibited from dealing in shares, and this was a dealing in shares with persons who affected to release them from claims, and affected to be released from claims.

I am of opinion that the Master of the Rolls was quite right, and this appeal must be dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *Deane & Chubb.*

Solicitors for General *Hall:* Messrs. *Gadsden & Treherne.*

STUART *v.* COCKERELL.

L. J.J.
1870
July 13.

Class, Period of ascertaining—Substitution—Vested or contingent Gift.

Personal estate was given by will to *S.* (a bachelor) for life, remainder to the eldest son of *S.* for life, remainder to *E.* for life, and after the death of *S.*, his eldest son, and *E.*, upon trust to transfer the same "to all and every the children of *S.* share and share alike, and the children of such of the children of *S.* as shall be then dead, according to the *Statute of Distributions;* but in case there shall be no child or grandchild of *S.* then living, upon trust to transfer the same to the children of *E.*":—

Held (affirming the decision of *Malins*, V.C.), that the gift was void for remoteness, the gift over shewing that it was not, as in *Bennett's Trust* (1)

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(1) 3 K. & J. 280.

L. J. J.
1870
STUART
v.
COCKERELL.

and *Baldwin* v. *Rogers* (1), a gift to all the children of *S.*, with a substitution of the children of such of them as died before the period of distribution, but a gift to a class of children and grandchildren to be ascertained at a period not confined within a life in being and twenty-one years.

11 Eq 501
3 Ch D 158-9
9 Ch D 523

THIS was an appeal Petition from an order of Vice-Chancellor *Malins.*

The testatrix in the cause, by her will, after directing her residuary estate to be invested in Government securities, directed her trustees to hold them upon trust to pay the income to Sir *Simeon Stuart* for life, remainder to the eldest son of Sir *S. Stuart* for life, remainder to her niece, *Elizabeth Stuart*, for life, and after the decease of the survivor of Sir *S. Stuart,* his eldest son, and *Elizabeth Stuart,* upon trust "to pay and transfer the said Government securities unto all and every the children of my said nephew, Sir *S. Stuart,* share and share alike, if more than one, and if but one, then to such one child, and the child or children of such of the children of the said Sir *S. Stuart* as shall be then dead, according to the *Statute of Distributions* of intestates' estates; but in case there shall be no child or grandchild of the said Sir *Simeon* then living, then upon trust to pay and transfer the said Government securities unto all and every the children of my said niece *Elizabeth,*" &c.

At the death of the testatrix, in 1785, Sir *S. Stuart* had no child. He afterwards had four children, two of whom died infants, and without issue, in his lifetime. Sir *Simeon Stuart* died intestate in 1816, *Elizabeth Stuart* in 1846, and Sir *Simeon Henry Stuart,* the eldest son of Sir *Simeon,* in October, 1868. The second son of Sir *Simeon* was still living.

The funds having been paid into Court under the *Trustees Relief Act,* the second son of Sir *Simeon Stuart* presented his Petition, claiming one quarter of the fund in his own right, and a share as one of the next of kin of his father in the shares of two children who died in his lifetime. The personal representative of *Elizabeth Stuart,* who was one of the next of kin of the testatrix, contended that all the limitations after the life estates were void for remoteness, so that there was an intestacy *ultrà* the life estates; and Vice-Chancellor *Malins* decided accordingly (2). The Petitioner appealed.

(1) 3 D. M. & G. 649. 17 Jur 267

(2) Law Rep. 7 Eq. 363.

L. J. J.
1870
STUART
v.
COCKERELL.

Mr. *Cotton*, Q.C., and Mr. *Riddell*, for the Appellant:—

We contend that this is not a gift to such of the children of Sir *S. Stuart* as shall be living at the period of division, and the children of such of them as shall be then dead, but a gift to all the children of Sir *Simeon*, with gifts over to the children of those children who are then dead leaving children. Those gifts over only are bad for remoteness, and the original gifts to the children of Sir *Simeon*, which are not too remote, remain unaffected. *In re Bennett's Trusts* (1), and *Baldwin* v. *Rogers* (2), are clear as to a gift in these terms not being a gift to a class of children and grandchildren.

[The LORD JUSTICE JAMES :—In neither of those cases was there a gift over in the event of no child or grandchild being alive at the time of distribution. Have you any case where the same construction has been put upon such a gift, where there has been an ultimate gift over like that in the present case ?]

We cannot find any decision upon that point.

Mr. *Wickens*, for the personal representative of *Elizabeth Stuart*, was not called upon.

SIR W. M. JAMES, L.J. :—

We have to construe this will according to the natural meaning of the words, in the same way as if no rule against perpetuities existed. It appears to me impossible not to see that the intention of the testator was to create a class consisting of persons to be ascertained on the failure of all the tenants for life—a class consisting of the children of Sir *Simeon Stuart* then living, and the child or children of such of the children of Sir *Simeon Stuart* as should be then dead. The limitation over in case of no child or grandchild of Sir *Simeon Stuart* being then living, seems to me to interpret the somewhat inconsistent terms of the original gift, and to put it beyond all reasonable doubt that no children of Sir *Simeon*, except such as should be living at the period of distribution, were objects of the gift. I am of opinion, therefore, that the Vice-Chan-

(1) 3 K. & J. 280.

(2) 3 D. M. & G. 649.

17 Jan

267.

L. J. J.
1870
Stuart
v.
Cockerell.

cellor has come to a correct conclusion as to the construction of this instrument, and that there is an intestacy after the failure of the tenancies for life.

Solicitors: Messrs. *Ward, Mills, & Witham;* Mr. *W. A. Ford.*

L. J. J.
1870
July 12.

Ch. D. 775.
9 QBD. 388.
Ch D 558

LEGGOTT *v.* METROPOLITAN RAILWAY COMPANY.

Vendor and Purchaser—Occupation Rent—Trade Premises.

In July, 1867, the Plaintiff sold to a railway company a house in which he was carrying on the business of a victualler, the terms being that the purchase-money was to be paid on the 25th of March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; and the Plaintiff was to be their tenant at a given rent, the tenancy not to be determined before the 25th of March, 1869, unless the company, after three months' notice, paid the money sooner, but to be determinable on the 25th of March, 1869, by a week's notice. The interest and rent were paid up to the 25th of March, 1869. The Plaintiff gave due notice to determine the tenancy on that day; but the company not having the purchase-money ready, he refused to give up possession, and in April filed a bill for specific performance. On the 18th of November, 1869, a decree for specific performance, with a declaration that the title had been accepted, and an order for payment of the purchase-money, with interest from the 25th of March, 1869, was made; and an inquiry was added whether, having regard to the circumstances and conduct of the parties, the company were entitled to any and what allowance in respect of the Plaintiff's occupation of the premises after the 25th of March, 1869:—

Held (affirming the decision of *Stuart*, V.C.), that the company were not entitled to any allowance by way of occupation rent.

THIS was an appeal motion to vary an order of Vice-Chancellor *Stuart*, refusing an application to vary the Chief Clerk's certificate, by certifying that the Plaintiff ought to be charged with an occupation rent of £800 a year.

On the 19th of July, 1867, an agreement was entered into between the Plaintiff and the *Metropolitan Railway Company*, for the purchase by the company of three leasehold houses, of which the Plaintiff was the owner, and in one of which he carried on the business of a victualler, the other two being let to tenants. The price was £12,000, to be paid or deposited in the Bank of *England* on the 25th of March, 1869, or at such earlier time as the company might choose, after giving three calendar months' notice. Possession was to be given on such payment or deposit being made. The tenant's fixtures, furniture, &c., were to be paid for at the same time at a valuation, which was to be made immediately. The stock in trade and licenses were to be valued before completion, and paid for at the same time. The vendor was to be tenant to the company from the 25th of March, 1867, at £800 a year, such tenancy not to be determined by either party before the 25th of March, 1869, unless the company, after giving three calendar months' notice, paid or deposited the purchase-money before that time; but on the 25th of March, 1869, it was to be determinable by seven days' notice. The company were to pay interest at £5 per cent. on the purchase-money and on the amount of the valuation of fixtures, furniture, &c., until completion. The vendor was to pay all outgoings during the continuance of the tenancy.

The tenant's fixtures, furniture, &c., were duly valued, and the Plaintiff remained in possession as tenant, paying the rent, and receiving the interest stipulated for till March, 1869, when he gave the requisite seven days' notice to determine the tenancy.

On the 20th of March the solicitors of the company, after receiving the notice, wrote to the Plaintiff's solicitors to say that on the 25th the company would be prepared with a person to take possession of the premises, and who would take to the tenant's fixtures, &c., at the valuation, and to the stock in trade and licenses at the price to be settled as provided by the agreement. The Plaintiff's solicitors replied by asking for a draft assignment of the premises. The company's solicitors replied: "Our letter of the 20th instant was written for the purpose of informing you, that should your client be desirous of giving up possession of the premises, the company would have a person ready to take possession, and would be prepared also to pay the amount due for fixtures, stock, &c. Our clients have not placed us in funds to enable us to pay the purchase-money on the day named." The Plaintiff's solicitors wrote in reply, that they could not advise the Plaintiff to give up possession without receiving the purchase-money. The company not being prepared to complete, the Plaintiff, on the 27th of March, served upon them a formal notice that he should take proceedings to compel completion, and should retain possession of the property as owner, and not as tenant to the company, and should hold the company answerable for payment of all outgoings from the 25th of March, 1869, as well as of the principal and interest. On the 23rd of April, 1869, the Plaintiff filed his bill for specific performance, asking also that the company might be decreed to reimburse him what he had paid for ground rent, taxes, and outgoings since the 25th of March, 1869.

On the 18th of November, 1869, a decree was made for specific performance, with a declaration that the company had accepted the title; and payment of the purchase-money, with interest at £5 per cent. from the 25th of March, 1869, was ordered. It was also ordered that the company should pay to the Plaintiff all such sums as he had properly expended in payment of rent, taxes, and other necessary outgoings as from the 25th of March, 1869; and an account of the sums so expended was directed. It was further ordered that an inquiry should be made whether, having regard to the circumstances and conduct of the parties, the company was entitled to any and what allowance in respect of the occupation by the Plaintiff of the premises.

On the inquiry as to allowance for possession, the Plaintiff deposed to the effect that he had not received any rent for the premises since the 25th of March, 1869, the premises formerly let to tenants having been unoccupied; and that he had carried on business at the tavern at considerable inconvenience and disadvantage, and with much less profit than would otherwise have been the case, owing to the uncertainty of his tenure.

The Chief Clerk certified that the outgoings properly paid by the Plaintiff amounted to £65; and that, having regard to the circumstances and the conduct of the parties, the company were not entitled to any allowance in respect of the occupation by the Plaintiff of the premises, except that the £65 ought, under the circumstances, to be borne by the Plaintiff.

Both parties took out summonses to vary this certificate, which were adjourned into Court. The Vice-Chancellor refused the Defendants' application with costs, and declined to make any order on that of the Plaintiff.

The company appealed from this decision.

Mr. *Karslake*, Q.C., and Mr. *Bovill*, for the company, in support of the appeal:—

The Vice-Chancellor has proceeded on a principle which the cases do not warrant, that where a purchaser is in default he is to pay interest without receiving anything in return. It is not just that the vendor should have both his £5 per cent. interest, and the benefit of occupation: *Dyer* v. *Hargrave* (1); *Fenton* v. *Browne* (2).

Mr. *Dickinson*, Q.C., and Mr. *Rodwell*, for the Plaintiff, were not called upon.

SIR W. M. JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor is quite right. No doubt it is the ordinary rule as between vendor and purchaser, that after the time fixed for completion the vendor is entitled to interest, and the purchaser to the rents and profits. But when the property is occupied by the vendor for the purposes of his business, and the purchaser makes default in payment of the purchase-money, until payment of which the vendor is not bound to give up possession, the vendor continues the business, not on the account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default. He carries it on under great inconvenience, for all his arrangements must be made subject to determination on the payment of the purchase-money. In such a case the application of the ordinary rule would not be just and right. The decree proceeds on the footing that the ordinary rule does not apply; and the onus of shewing that an occupation rent ought to be allowed is thrown on the railway company, from which onus they have not discharged themselves. The appeal motion must be refused with costs.

Solicitors: Messrs. *Paine & Layton*; Messrs. *Burchells*.

(1) 10 Ves. 505. (2) 14 Ves. 144.

L. J. J.
1870
July 15.

[illegible]
ChD. 493.
2 ChD 441

ATHERTON *v.* BRITISH NATION ASSURANCE COMPANY.

Practice—Staying Proceedings pending Appeal—Money in Court.

The holder of a policy of life assurance filed a bill against the company to recover the amount insured. The Master of the Rolls decided in favour of the Plaintiff, but ordered the money to be paid into Court, pending an appeal by the Defendants. The Court of Appeal in Chancery reversed the decree, and dismissed the bill with costs. The Plaintiff then appealed to the House of Lords.

The Court refused to order the money to be retained in Court pending the appeal.

THE Plaintiff in this case was the assignee of a policy of assurance for £1000 on the life of a person named *Rigg*, and the bill was filed to recover the amount insured from the company. The claim was disputed by the company, on the ground that at the time when the policy was effected the fact that *Rigg* was a person of intemperate habits was fraudulently concealed. The Master of the Rolls, before whom the case was heard, considered that the Plaintiff was entitled to recover the amount, and made a decree for payment to him; but on the Defendants' application, His Lordship stayed the execution of the decree pending a rehearing before the Court of Appeal in Chancery, on the terms of the money being brought into Court. On the 2nd of June, 1870, the decision of the Master of the Rolls was reversed by the Lord Chancellor and Lord Justice *Giffard*, who dismissed the bill with costs.

The Plaintiff then presented an appeal to the House of Lords, and moved that the proceedings under the decree might be stayed pending the appeal.

Mr. *North* (Sir *R. Baggallay*, Q.C., with him), for the motion. contended that, the fund being in Court, the Court would prevent its passing out of its power until the appeal had been disposed of: *Corporation of Gloucester* v. *Wood* (1).

With respect to the costs of the application, the rule was that they should abide the result of the appeal: *Burdick* v. *Garrick* (2).

Mr. *Bevir* (Mr. *Jessel*, Q.C., with him), for the Defendants, argued

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(1) 1 Ph. 493.

(2) Law Rep. 5 Ch. 453.

L. J. J.
1870
ATHERTON
v.
BRITISH
NATION
ASSURANCE
COMPANY.

that the fact of the money being in Court was no reason for staying the execution of the decree. The bill having been dismissed, the Court had no jurisdiction to make the order asked for: *Galloway* v. *Corporation of London* (1). In *Corporation of Gloucester* v. *Wood* (2) the Defendants were executors, and they could not distribute the fund till the question was ultimately settled.

With respect to the costs payable to the solicitors, they were willing to give their personal undertaking to refund them if the decree should be reversed by the House of Lords.

Mr. *North*, in reply.

SIR W. M. JAMES, L.J.:—

I am of opinion that with regard to the main object of this motion it must fail. The suit is not for the distribution of assets, but is a personal demand made by the Plaintiff against the Defendants for a certain sum of money. The Master of the Rolls held that the Plaintiff's claim was well-founded, and ordered the money to be paid to him. The Defendants appealed, and the money was ordered to be paid into Court pending the appeal. The money was brought into Court, as the price for staying execution of the decree until the appeal had been heard. The Plaintiff has failed before the Court of Appeal, and he has now no longer any claim to execution. The reason for which the money was brought into Court no longer exists, and it is my duty to put the parties in the same position as if the Master of the Rolls had done what the Court of Appeal says he ought to have done, namely, dismissed the bill with costs. If he had done so the money would not have been paid into Court at all. The Plaintiff, therefore, fails in his present application as to the money in Court.

With respect to the taxed costs, they will be paid to the Defendants' solicitors on their giving a personal undertaking to refund them if the result of the appeal to the House of Lords should be unfavourable to the Defendants.

The Plaintiff must pay the costs of the application.

Solicitors: Messrs. *Lydall & Sweeting*; Messrs. *G. L. P. Eyre & Co.*

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(1) 3 D. J. & S. 59. 11 Jur. N.S. 537 (2) 1 Ph. 493.

L. J. J.
1870
July 23.

Ex parte POOLEY.
In re RUSSELL.

Bankruptcy Act, 1869, s. ~~16~~ 125, 126.—*Gen. Ord. in Bankruptcy, Jun.* 1, 1870, *rule* ~~126~~—276, *Majority of Creditors—Voting.*

6 Ch 888, 4-5, 886
8 Ch 725
9 Ch 585
— 719
10 Ch 90
3 Ch D. 121, 122
5 Ch D. 914
97
3 Ch D. 426 7

At a meeting of creditors resolutions were proposed for a liquidation by arrangement. A large creditor attended by proxy and opposed the resolutions, and voted against them on the shew of hands, but afterwards signed them. If this creditor were excluded, the resolutions were not passed by the requisite majority :—

Held (affirming the decision of the Chief Judge), that the resolutions were duly passed and ought to be registered ; for that, according to the Act, the votes of the signing creditors were determined by their signatures ; and the course which they had taken at the meeting could not be looked to.

THIS was an appeal by Mr. *Pooley*, a creditor of Sir *W. Russell*, from an order of the Chief Judge in Bankruptcy, directing the Registrar to register certain resolutions of the creditors.

The proceedings were commenced by the Petition for liquidation of Sir *W. Russell*, presented in the *London* Court of Bankruptcy. The first meeting of creditors was held on the 7th of April, 1870, and passed no resolution except to adjourn to the 28th. On the 20th of April *Pooley* presented a Petition for adjudication against Sir *W. Russell*, which was appointed to be heard on the 4th of May. On the 28th of April the adjourned meeting was again adjourned to the 26th of May. On the 4th of May the Chief Judge made an order staying the proceedings in bankruptcy till the 27th of May.

On the 26th of May the adjourned meeting of creditors was held, and seven resolutions were proposed on behalf of the debtor, being the resolutions the registration of which was appealed against. The resolutions provided that the estate should be liquidated by arrangement, and not in bankruptcy ; appointed a trustee and a committee of inspection ; and provided that the debtor should have his discharge upon payment of £4000 being made to the trustees within a month after the registration of the resolutions, or, in case of appeal, after the confirmation of them, and upon the debtor giving within the same period a covenant or bond for the payment of the further sum of £5000 by certain instalments, and that the payment of the £4000 should be taken in satisfaction of

L. J. J.
1870
Ex parte
POOLEY.
In re
RUSSELL.

any right of the creditors to apply to the Court of Bankruptcy as to the pay or half-pay of the debtor.

It was deposed to that a Mr. *Parker* attended at the meeting as proxy for Sir *W. Foster*, a large creditor, spoke against the resolutions, and voted against them on a show of hands; that Mr. *Parker* afterwards sent to the Registrar a notice of his intention to oppose the registration of the resolutions, but afterwards withdrew such notice, as appeared by the file of proceedings. *Pooley's* solicitor attended at the meeting, and voted against the resolutions.

On the 9th of June *Pooley's* solicitor attended, pursuant to notice, before the Registrar, when the above resolutions were produced, signed by the requisite majority of creditors present at the meeting, Sir *W. Foster* being one of the signing parties. *Pooley's* solicitor opposed the registration; and the Registrar, having satisfied himself that if Sir *W. Foster's* name was struck out the resolutions were not signed by the requisite majority, declined to register them, and indorsed a memorandum to that effect upon the application.

The Chief Judge made an order reversing the order or memorandum of the Registrar, and directing the resolutions to be registered forthwith. *Pooley* appealed.

Mr. Serjeant *Sargood* and Mr. *Bagley*, for the Appellant, contended that the appeal from the Registrar's decision ought to have been to this Court in the first instance; that the resolutions were for acceptance of a composition, and ought to have been passed by an extraordinary resolution, under rule 126, and not by special resolution, under ~~rule~~ 125; and that the votes must be taken at the meeting.

[The LORD JUSTICE JAMES stated his view to be that the matter had properly been taken before the Chief Judge.]

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Respondent.

Mr. Serjeant *Sargood*, in reply.

[The *Bankruptcy Act*, 1869, ss. 16, 125, 126; the *General Orders in Bankruptcy*, Jan. 1, 1870, Ord. 275, 302; *Anthony* v. *Seger* (1); and *Elt* v. *Burial Board of St. Mary's, Islington* (2), were referred to.]

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(1) 1 Hagg. Consist. 9.

(2) Kay, 449.

L. J. J.
1870
Ex parte POOLEY.
In re RUSSELL.

SIR W. M. JAMES, L.J.:—

In my opinion the Chief Judge was quite right in sweeping away the cobwebs which have been spread over a very simple matter. The arguments must have been pure gold, or they would never have borne beating out to such an extent. The question turns on the construction of a few lines of the Act, and of the Orders which have the same force as the Act. We have to ascertain whether these resolutions were passed by a majority in number, and a majority of three-fourths in value, of the creditors who were present personally or by proxy at the meeting. The Act does not say that the resolutions must be passed by shew of hands, nor indeed that the votes must be given at the meeting at all. I never saw the deed of settlement of a company in which, if anything had to be decided by the votes of a majority, there were not regulations as to ascertaining the majority by ballot or poll, or in some such way that the votes could be scrutinized. Now what are the provisions of the Act?—That we are to look at the resolutions signed by the requisite majority. The Registrar has nothing to do with what the chairman said, or what any shareholder said in the room: he must only look at the paper signed by the proper number of shareholders—that is, the evidence of the resolutions having been passed. As Mr. *De Gex* said, they vote when they affix their signatures to the resolutions; that is, in fact, the only mode of voting contemplated by the Act. As to the objection which was urged here, though it had not been mentioned before the Chief Judge, that these resolutions were of such a nature as to require that they should be passed as extraordinary resolutions, I am of opinion that there is nothing in it. This is a liquidation by arrangement, adding to it what the Statute says may be added —conditions upon which the future property was to be released. This is a proper matter for special resolutions. The appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *Harper, Broad, & Manby.*

Solicitors for the Respondent: Messrs. *Linklaters, Hackwood, & Addison.*

In re AGRICULTURIST CATTLE INSURANCE COMPANY.

L. J. J.
1870
July 7, 8, 26.

BAIRD'S CASE.

Company—Deceased Shareholder—Extent of Liability of his Executors.

6 Ch 396
7 Ch 202
4 CPD 20

In a joint stock company the presumption is, that the executors of a deceased shareholder succeed to the full liability, as well as to the rights of their testator. The deed of settlement is to be looked at, not to see whether it imposes such liability on the executors, but whether it takes it away or limits it.

The fact that by the deed of settlement executors are not entitled to the full privileges of shareholders until they or their nominees have been registered as shareholders, is no proof of an intention to limit their liability in their representative character.

Accordingly, in the case of a joint stock company formed in 1845, where, in the opinion of the Court, nothing appeared in the deed of settlement to limit the liability of the executors of a deceased shareholder, it was held, (reversing the decision of the Master of the Rolls) that their liability was not limited to debts incurred before the death of the testator.

THIS was an appeal from a decision of the Master of the Rolls, made in the winding up of the *Agriculturist Cattle Insurance Company*.

The company was formed in 1845, under a deed of settlement which was executed by the shareholders. By this deed, in the 1st clause, the parties thereto covenanted that the several persons parties thereto, all of whom were thereinafter distinguished by the title of shareholders, and the several persons who should become shareholders as thereinafter mentioned, should, while holding any share or shares in the capital of the company, and notwithstanding the death, bankruptcy, insolvency, or retirement of any or either of the shareholders, be and continue a company, by and under the title of the *Agriculturist Cattle Insurance Company*, for the term or period of fifty years, commencing from the day of the date thereof, unless the company should be sooner dissolved in pursuance of the provisions thereinafter contained, and for such further term or terms of years, if any, as might be thereafter resolved upon, under the provisions thereinafter contained, for the purposes and upon the terms and conditions thereinafter expressed and contained in the clauses following.

L. J. J.
1870
Baird's Case.

The 125th clause provided that, upon the neglect or refusal of any holder of shares to pay any instalment or subscription, or upon the neglect or refusal of any person, after his being approved of as a shareholder by the directors, to execute the deed of settlement, the directors might declare the shares to be forfeited, or might, if they should think fit, enforce the payment of any such instalment or subscription against such shareholder, or his executors, administrators, or assigns, instead of declaring such shares forfeited.

The 173rd clause provided that the husbands of female shareholders, and the executors or administrators of deceased shareholders, and the assignees of bankrupt or insolvent shareholders, should not, in such capacities, be holders of any shares, or be entitled to receive any dividends declared after such marriage, death, bankruptcy, or insolvency; but such dividends should remain in suspense until some purchaser should become a shareholder in respect of such shares; and then such husband, executors, administrators, or assigns should be entitled to receive the dividends or other profits which had been suspended.

By clause 175 the husbands of female shareholders, and the executors or administrators of deceased shareholders, had power to become shareholders themselves; or, by clause 176, they might procure some other persons to become shareholders in respect of any shares held by them, or might sell the same to the board of directors. The 179th clause provided that husbands of female shareholders, and representatives of deceased shareholders, must, previously to their becoming themselves, or procuring any other persons to be shareholders, deposit their certificates of marriage, and probates and letters of administration, at the office of the company.

The 185th clause provided that every person who should have been approved by the directors as a holder of shares should execute a deed of covenant to abide by the regulations of the company.

The 190th clause provided that, when and so often as any person, not a purchaser from the board of directors, should have become a holder of any share or shares in the company, and should have executed a deed of covenant to observe the covenants, agreements, and provisions contained in the deed of settlement, the last holder or owner of such share or shares, and all persons claiming through or under him other than the new shareholder, should, from the time of such new shareholder becoming such, and on payment of such moneys, if any, as might be owing to the company in respect of such shares, be, as between the company and such last shareholder, for ever acquitted and discharged from all further claims, demands, and liabilities in respect of such shares; and the certificate of the directors, that he had ceased to be a shareholder, would be conclusive evidence of such acquittance and discharge.

The 203rd clause made the existing shareholders, and the executors and administrators of deceased shareholders, liable to contribute to the costs of actions and suits by and against the company in case the moneys of the company should be insufficient for that purpose.

Clause 208 contained a mutual covenant between the parties in proportion to their respective interests for the time being in the company, which interest was to be ascertained by the number of shares which they might respectively hold therein, as shewn by the books of the company, that each shareholder, his or her executors or administrators, should indemnify the other shareholders against all loss beyond their own shares and proportions, and should pay all calls and observe all the covenants contained in the deed.

In April, 1861, the company was ordered to be wound up.

Sir *David Baird* was the holder of ten shares in the company. He died in January, 1852, having appointed his widow, Lady *Baird*, his sole executrix.

In the year 1869 the name of Lady *Baird* was placed upon the list of contributories as executrix, and a summons was subsequently taken out by the official manager for a call of £190 per share upon Lady *Baird* as executrix.

The summons was adjourned into Court, and the Master of the Rolls decided that Lady *Baird's* liability must be confined to obligations incurred before the death of Sir *D. Baird*, and directed inquiries as to such liabilities (1).

(1) 1870. June 6.

LORD ROMILLY, M. R.:—

The first question is, what is the general law upon the subject; and in the absence of any special contract I think there is no doubt upon that point. In the case of an ordinary partnership, which this is, no partner is liable for debts incurred after he ceases to be a partner; about that there can be no question, and there are abundant

From this decision the official manager appealed.

Mr. *Southgate*, Q.C., and Mr. *C. T. Simpson*, for the Appellant:—

This is not the case of an ordinary partnership, in which the partnership is ended by the death of any of the partners. The

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authorities upon the subject. Accordingly, the executor of a deceased partner cannot complain of his testator's name being used by the partnership firm, because it entails no liability on him. Of course, for all debts incurred up to the time of his death he is liable.

In this company, as far as I can see, there has been no attempt, in cases of transfer or forfeiture, to make the person who has transferred or forfeited the shares liable for debts incurred subsequently to the transfer or subsequently to the forfeiture. The result is that, if the liability in the present case rests upon anything, it must rest upon the construction of the deed. Upon that point I have looked very carefully into the deed. [His Lordship then referred to several clauses of the deed, particularly the 1st, 125th, 173rd, 176th, 179th, and 185th, and continued:—]

In my opinion this deed lays down with great distinctness all the exact steps and preliminaries which must be adopted for the purpose of obtaining a transfer of the shares. It appears to me impossible to consider that the meaning of it was that a shareholder's estate should be liable for those shares, notwithstanding his death. Of course it is not pretended that a man may not enter into a covenant of that description so as to make himself a partner for fifty years certain, if he thinks fit, and the only question is whether he has done so.

In my opinion, he has entered into no such covenant in this case; and I have now to consider whether the cases cited establish the proposition that what has been done here amounts to a contract. I find, in the cases which have been cited a distinct contract to be liable. The first is *In re Northern Coal Mining Company. Blakeley's Case* (13 Beav. 133; 3 Mac. & G. 726). There the company was to continue for forty years, unless previously dissolved; and the 5th article was to this effect: That all the estate, property, and effects of the company should be deemed personal estate, and the shares therein of deceased proprietors should belong to their personal representatives, and there should not be any benefit of survivorship amongst the proprietors. There there is a distinct covenant and agreement that a man, by death, shall not lose the rights he would have got by remaining alive; if profits are made he is entitled to them. Then the amount of each share was to be paid by the proprietor for the time being, or his heirs, executors, and administrators; and the registered holder of the shares was to be deemed the absolute, sole, and beneficial owner, and the company was not bound to be affected by any trust unless it had been duly admitted as such. Then the 16th article was to this effect: That the executors, administrators, and legatees of deceased proprietors, and the husbands of female proprietors, should never be deemed or considered as proprietors in respect of shares in the said copartnership held by them in any of these capacities until they should be duly admitted as proprietors, in pursuance of the provisions of the deed; and before they were to be admitted they were to give notice of their desire to be deed of settlement expressly stipulates that the partnership is to continue for fifty years, notwithstanding the death or bankruptcy of any of the partners. That being so, it is for the other side to shew, from the deed, that the liability does not continue after the

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admitted, and to produce a probate copy of the will under which they claimed, and were executors and legatees; and when admitted to be proprietors, they were to execute the deed of settlement, and then, but not before, they were to become proprietors. Then when that was done, and the transfer took place, the shares became vested in the new proprietor, and he executed the deed, and then, but not till then, all future liabilities of the previous proprietor were to cease. It is to be observed that this applies to executors, and therefore it is expressly stated that, until the transfer took place in respect of executors, the liability of the previous proprietor was not to cease. Lord *Langdale* held in that case that, upon the death of the proprietor, his estate continued liable until a new liability had been created, pursuant to the deed; and the clauses to which I have referred clearly laid down that principle.

This went by appeal before Lord *Truro*, who was a very careful Judge. Lord *Truro*, after referring to all the articles, and going through them very elaborately, says: "Although this principle, by reason of the great number of partners, and of the power of each partner to transfer, with the consent of the directors, his interest in the partnership, varies from the case of an ordinary partnership, still the partners and their representatives, as in all other partnerships, must be regulated and governed by the contract into which they have entered." Then he refers to all the clauses, which I do not think it necessary to go through, and decides it upon the principle of the contract which had been entered into. He refers to a passage in Lord *Langdale's* judgment, which he approves of entirely: "Although it is provided that no one has a right to receive profits until a transfer of the shares has been made, and a new personal liability has been thereby created, yet I consider it to be clear that if the profits do accrue during the interval between the testator's death and the creation of such liability, such accrued profits must on the transfer become payable by the company to the transferor or transferee, as may be agreed between them. The shares do not survive as in ordinary cases, and because they do not survive, but are expressly declared to belong to the personal estate of the deceased proprietor, they must, I think, belong to it, or form part of it, subject to the incidents affecting the possession of a portion of the capital or estates of the partnership under the management of the directors, as provided for by the deed, and if profits or losses arise, I think that a right to a share of the profits, and with that a liability to contribute a share of the losses, are necessarily incident to the shares themselves, or to the right to the shares." Then Lord *Truro* says: "There appears to have been no authority applicable to the present case, but upon principle I agree with the Master of the Rolls." In that case, therefore, it was expressly directed that the shares should continue part of the estate of the person deceased. After referring to that, Lord *Truro* affirms the decision of the Master of the Rolls.

The other case that was cited before me is the case of *Ex parte Gouthwaite*

L. J. J.
1870
BAIRD'S CASE.

death of the shareholder. On the contrary, every part of the deed shows that the executors of deceased shareholders were intended to be liable in their representative capacity. They are entitled to have the shares registered in their names, or in the names of their nominees, and they are entitled to the accumulations of dividends as soon as this is done. If they have the benefit of the shares, they must also be subject to the liability. They are, moreover, expressly named in the covenant for mutual indemnity, and in the other clauses for contribution among the shareholders; and there is no mention of any limitation to such liability.

The case is concluded by *Blakeley's Case* (1), which is precisely in

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(3 Mac. & G. 187). There was a covenant to exactly the same purport in this case as there was in *Blakeley's Case*. It was there held, in the winding up of the company, that in the absence of any proof that the executrix had done any acts constituting her a member of the company, the estate of the deceased partner was liable to contribute, and that the name of the executrix ought to be placed on the list of contributories in her representative character. It was upon that ground alone that she was held to be liable upon the construction of the deed. The Lord Chancellor did not go at length into the question further than to decide that she was to be put on the list of contributories in the character of a contributory as the executrix of the testator. Accordingly, when the Lord Chancellor held that the decision of Vice-Chancellor *Knight Bruce* was right, Mr. *Rolt* said: "Your Lordship does not intend to determine anything as to the period to which Mrs. *Gouthwaite's* liability continued, or whether it continued subsequent to the period of her husband's death?" The Lord Chancellor replied: "No; I only say that her name ought to be put on the list of contributories." If His Lordship had said the opposite, I do not think it would affect this case, because there was an express covenant that the estate was to remain liable until the contract was at an end, and I do not find that in this case. It is, I am satisfied, a mere question upon the construction of the articles themselves. I have read through the deed as carefully as I can. It is a very carefully prepared deed, and I cannot find any clauses which bear on the subject, except those I have mentioned. They all appear to me to go upon this principle, that the liability only lasts as long as a person is a shareholder, that he ceases to be a shareholder in case of forfeiture, in case of transfer, or in case of death, and that thereupon all his subsequent liability ceases, and he cannot be called upon in respect of future liability.

I am of opinion, therefore, that Lady *Baird's* contention is a right one in this case, and I think the proper order to make will not be to dismiss the summons, but to order it to stand over and direct an inquiry what liability or debts there were of this company which existed previously to the death of Sir *David Baird*. The parties will know what they have to meet, as some questions may arise possibly about marshalling.

(1) 13 Beav. 133; 3 Mac. & G. 726.

point; but there are many other cases which support the same view: *Ex parte Gouthwaite* (1); *Houldsworth* v. *Evans* (2); *Hamer's Devisees Case* (3); *Heward* v. *Wheatley* (4); *Keene's Executors' Case* (5); *Turquand* v. *Kirby* (6); *Wills* v. *Murray* (7); *Straffon's Executors' Case* (8).

Mr. *Jessel*, Q.C., and Mr. *B. B. Rogers* for Lady *Baird*:—

The present partnership does not differ from an ordinary partnership, except so far as it is modified by the express provisions of the deed. Therefore, unless there is an express covenant that the liability of estates of deceased shareholders shall extend to dealings after their death, the ordinary rule prevails. The mere fact of the partnership being for a term certain does not make the representatives of a deceased member partners: *Gillespie* v. *Hamilton* (9); *Pearce* v. *Chamberlain* (10); *Ex parte Williams* (11). In the present case the meaning of the 1st clause is that, on the death of a partner, the partnership between the other partners should continue. The value of the share of the deceased partner belongs to his executors, but the share itself lapses to the other shareholders, in the same way as in an ordinary partnership the executors of a deceased partner have a share in the assets, but not in the partnership; although the share could be taken up by the executors if they chose to become registered members. There is a distinction throughout the deed between "holders of shares" who are not necessarily members of the company, and "shareholders" who are. This case is distinguishable from *Blakeley's Case* (12) and *Ex parte Gouthwaite*; for in the deeds in those cases there was an express covenant that the liability should continue till a new shareholder was substituted.

This case also differs from those which arose in going concerns. Assuming that we should be liable to a call by the directors, which would be a specialty debt, it does not follow that we are liable to a balance order in a winding-up to pay the ordinary

(1) 3 Mac. & G. 187.
(2) Law Rep. 3 H. L. 263, 282.
(3) 2 D. M. & G. 366.
(4) 3 Ibid. 628.
(5) Ibid. 272, 278.
(6) Law Rep. 4 Eq. 123.
(7) 4 Ex. 843.
(8) 1 D. M. & G. 576.
(9) 3 Madd. 251.
(10) 2 Ves. Sen. 33.
(11) 11 Ves. 3.
(12) 3 Mac. & G. 726.

L. J. J.
1870
BAIRD'S CASE.

simple contract debts of the partnership, contracted after the testator's death: *Robinson's Executor's Case* (1).

July 26. SIR W. M. JAMES, L.J.:—

In this case the Master of the Rolls, in placing the executrix of a deceased shareholder on the list of contributories, has placed her with a qualification limiting her liability to the death of her testator, and giving consequential directions for ascertaining such liability.

This is the first instance in which any such qualification has been annexed to the liability of a representative contributory, although there must have been very many cases of executors made contributories in such character; and it would be difficult to exaggerate the inconvenience, the complication, and the confusion which would arise in the liquidation of joint stock companies if separate accounts had to be taken at the time of the death, or of the bankruptcy, of each shareholder in respect of whose shares there are only representative contributories.

But, of course, if the law compels the Court to embarrass itself with such difficulties, it must encounter them as it best may.

Does the law so compel the Court? The conclusion to which the Master of the Rolls has come, and the argument addressed to me in support of that conclusion, are mainly based on the general law of partnership, that a man ceases to be a partner by his death, and that he is therefore a stranger to all subsequent proceedings, dealings, and transactions of the surviving partners after his death, and cannot therefore be under any liability in respect of them; that therefore, in construing the deed of partnership, this, the ordinary law, the natural and ordinary incident and consequence which flows out of the contract of partnership, must always be kept in mind; that the burden of proof is thrown on those who contend that such ordinary law is superseded by the express contract of the parties, and that such burden can only be discharged by shewing in the contract express words or plain implication.

(1) 6 D. M. & G. 572.

I am bound to state, at the very outset of the case, my entire dissent from this. I hold that no such principle is applicable to the case of a joint stock company.

Ordinary partnerships are essentially in kind, and not merely in the magnitude of the partnership or the number of the partners, different from joint stock companies.

Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of this partnership to the value of millions, may bind the partnership by contracts to any amount, may give the partnership acceptances for any amount, and may even—as has been shewn in many painful instances in this Court—involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them.

That being the relation between partners, of course, when the Court had to consider whether a partner could substitute or let in some other person for or with him, or whether a partner's executor could claim to succeed to him, there could be no difficulty in saying that this could not be done without the consent of all the partners. The death of a partner, therefore, necessarily put an end to the partnership, so far as he was concerned; and as, in the absence of express stipulation, the right of the representative was to have all the assets realized and divided, it necessarily put an end to the whole subject matter of the partnership; as indeed, independently of that right, a contract between *A.*, *B.*, and *C.* to be partners, is essentially a different thing from a contract that they, or the survivors of them, should be partners.

Therefore, when the simple case was presented to the Court of an agreement between *A.*, *B.*, and *C.* to be partners for a long term of years, and nothing more, it was of course held that, in the absence of express stipulation, the mere length of the term afforded

L. J. J.
1870
Baird's Case.

no sufficient presumption to prevent the application of the ordinary law, and therefore it was held that the death of one was the dissolution of the society as to all. But it was because these were the ordinary law and consequences of an ordinary partnership—it was to escape from these, that joint stock companies were invented. That was the very cause and reason of their existence.

At first they existed under the favour of the Crown, which gave them charters of incorporation, and nobody ever supposed that the holders of stock in the *Bank of England* or the *East India Company* had anything to do with the law of partnership, or were partners.

But there were large societies on which the sun of royal or legislative favour did not shine, and as to whom the whole desire of the associates, and the whole aim of the ablest legal assistants they could obtain, was to make them as nearly a corporation as possible, with continuous existence, with transmissible and transferable stock, but without any individual right in any associate to bind the other associates, or to deal with the assets of the association.

A joint stock company is not an agreement between a great many persons that they will be co-partners, but is an agreement between the owners of shares, or the owners of stock, that they or their duly recognized assigns, the owners of the shares for the time being, whoever they may be, shall be and continue an association together, sharing profits and bearing losses. No shareholder in a joint stock company is, in the legal sense of the word, any more a partner than the owner of bank stock is; he may not have the same limit of liability, but in every other respect he is the same; he has the same right to take part in public meetings of the body, he has the same right to elect or remove directors, he has the same right to vote for or against the resolutions of the body, he has the same right to such dividends as may be declared, and he has the same right to dispose of his share as a separate and distinct piece of property, and no other rights in or over the association, its assets, or its transactions; and if he is liable under any contracts or obligation, or in respect of any act of the body, it is not because they are the contracts, obligations, or acts of his partners or partner, but because they are the contracts, obligations, and acts of the *quasi* body corporate (under present legislation the actual body corporate), by its properly constituted agents. It may be, and generally is, no doubt, that the agents, the directors, are shareholders, and in that sense partners, but it is certain that there may be a board of directors perfectly competent to bind the whole body, although every one of them may have disqualified himself by parting with every share.

Starting then, with this view of the relation which exists between the associates in a joint stock adventure, the presumption is that the death of a shareholder makes not the slightest difference, either in right or liability; that the executor of a deceased shareholder, who succeeds in point of property to the share, takes it (of course in his executorial character) on exactly the same terms and conditions as every other owner of a share—equal benefit, equal liability; and the deed has therefore to be scrutinized, not to see whether it gives or creates such equal benefit and liability, but whether it takes away the one or releases the other.

Now when we come to examine the deed, which is substantially like all other joint stock deeds, it seems to me clear that, so far from excluding, it does in every clause, from beginning to the end, attach the same liability to executors as to others:—[His Lordship then referred to the 1st, 190th, 203rd, and 208th clauses, and continued:—]

The only difference made with respect to executors is that, although they are talked of throughout as "holders of shares," they are talked of as only having a right to become "shareholders," and they are not actually to receive dividends, or to exercise any right in respect of their shares until they shall have either got themselves or procured other persons to become formally registered as shareholders, having duly bound themselves by covenant to the articles of association.

The object of these provisions is so plain, so reasonable, so natural, that it is impossible to draw from them any implication adverse to the conclusions to be drawn from the nature of the association or the rest of the deed. The dead shareholder remains—that is, his estate remains—a member, but the association would of course like something more than a dead man or an estate; they would like a living member, actually bound by personal covenant like all the others, and so they put this pressure on the executors: "You cannot actually draw out the property, you cannot vote, you cannot exercise any other right;" but they do not forfeit the shares, they do not absorb them, they do not even suspend the dividends; the share remains untouched, all dividends declared are declared upon the executor's share like all others; whenever he chooses to deal with the shares the dividends are there for him, and if the company were to be wound up and to wind up prosperously and not disastrously, those dividends would have to be paid to the executor before any distribution of capital, and in the final distribution of capital the executor's share would be credited with the same quota as every other holder's share. It appears to me, therefore, that on every principle of equity, as well as on the plain construction of the deed, it is impossible to draw any distinction between the dead shareholder's estate and the living shareholders', as to the extent and measure of liability.

I have so far expressed my opinion without reference to authorities, but it appears to me that the case is abundantly concluded by authorities. I am unable to draw any substantial distinction between this case and *Blakeley's Case* (1): the only verbal distinction is, that in specifying the circumstances under which a shareholder is to be discharged, the clauses in that company's deed contained those negative words "and not till then;" words which, in my judgment, add nothing to the real meaning of the provision.

It has, indeed, been pressed upon me that the authorities only conclude that which comes within the very terms of the covenant: that a man's executors are liable to that which he has covenanted for; but that the liability to a winding-up call is not a liability under the covenant, but a liability arising out of the partnership relation. That, in truth, is repeating in another form the main assumption which I have dealt with. The winding-up call is for the purpose of obtaining the proper contributions from all the owners of shares, whoever they are, to provide for the losses and expenses which have fallen upon the association at large; and there is no ground, in my judgment, for making a distinction between a representative owner and any other owner. This, too, is concluded by authority, and by the authority of the Master of the Rolls himself: *Turquand* v. *Kirby* (2). In that case the claim was for the entire call, and there was no suggestion that the estate was to be released from everything since the death, which would probably have reduced the demand to something very small, if not to nothing.

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(1) 3 Mac. & G. 726.

(2) Law Rep. 4 Eq. 123.

I have taken some considerable time to consider this question. I have felt that I might be misled by knowing what I, as the draftsman in my early professional life of more than one of these deeds, knew to be the intention of the draftsman—at least my intention as draftsman; but, on the fullest consideration, I cannot bring myself in the result to entertain any doubt that that intention is sufficiently and clearly expressed, and that it is in accordance with the truth and honesty of the case. I am obliged therefore, to discharge the Master of the Rolls' order so far as it imposes any limit or condition on the liability of the executrix, and to declare that she ought to be put on the list *simpliciter* as a contributory, of course in her character of executrix, and so as to make her liable in respect of assets.

Solicitors for the Company: Messrs. *Horn & Murray.*

Solicitors for Lady *Baird:* Messrs. *Miller & Smith.*

In re ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY.

Ex parte MACLURE.

L. J. J.
1870
July 29.

Winding-up—Insurance Company—Proof by Agent for prospective Commission.

A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10 per cent. on all business transacted. Before the five years were expired the company was wound up voluntarily:—

Held (affirming the decision of the Master of the Rolls), that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years.

1 Asp Ca
258-9.

THIS was an appeal from an order of the Master of the Rolls made in the winding up of the *English and Scottish Marine Insurance Company, Limited.*

On the 16th of May, 1867, Mr. *J. W. Maclure* entered into a

L. J. J.
1870
In re ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY.
Ex parte MACLURE.

written agreement with the company, whereby it was agreed that he should serve the company as their underwriter and agent, for the purposes of their business, in the *Manchester* district, he undertaking to do no other insurance business without the consent of the directors, from the 1st of February, 1867, for the term of five years, at a salary of £500 per annum, to be paid by quarterly instalments on the days therein mentioned. He was also to receive 10 per cent. commission on the profits of each year, to be calculated as specified in the said agreement; and in consideration of his providing offices and clerks for the purposes of the business of the company he was to receive for such office expenses and for travelling expenses during the first year of the said term the sum of £250, and during the remainder of the said term such a sum as should be eventually agreed upon, or settled, in case of difference, by arbitration.

This agreement was acted upon till the company was wound up, which was done voluntarily, by resolutions passed in November, 1868; and on the 12th of December, 1868, an order was made to continue the liquidation under the supervision of the Court.

Mr. *Maclure's* claims against the company under this agreement were divided into four heads:—

First: The balance due to him to the time of the commencement of the liquidation, for salary, office expenses, and commission. This was assessed at £572, and was agreed to by the liquidators.

Secondly: The prospective value of the salary of £500 a year till the 1st of February, 1872, when the term of five years ended.

Thirdly: The office expenses to the same date.

Fourthly: The prospective value of the commission to the same date.

The claim was heard by the Master of the Rolls on a summons adjourned into Court, and His Lordship decided that Mr. *Maclure* was entitled to the estimated value of the salary till the 1st of February, 1872; that as to the office expenses, he had agreed to accept a specified sum from the official liquidator, and was bound by that agreement; and that he had no claim in respect of the value of commission since the winding up of the company. From this decision, so far as regarded the last two items, Mr. *Maclure* appealed. As the question concerning the office expenses depended

L. J. J.
1870
In re English and Scottish Marine Insurance Company.
Ex parte Maclure.

entirely on the correspondence between the parties, it is unnecessary to state the arguments on this point.

Mr. *Jessel*, Q.C., and Mr. *Macnaghten*, for the Appellant:—

We make the claim, not for unpaid commission, but for damages for breach of agreement. Mr. *Maclure* gave up his private business in order to enter into the service of the company, and in consideration thereof the company agreed to give him a salary and commission on their profits for a fixed term of years. There was, therefore, an implied contract that they would carry on their business so as to make profits in the usual way during that term. They have discontinued their business altogether, and so broken the contract. The point was expressly decided in *McIntyre* v. *Belcher* (1), where *Willes* J., uses this illustration:—"If I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach." There would be no real difficulty in assessing the damages: it would be a question for a jury. If the Court should be against us as to the existence of a cause of action, we ask for a trial at law. We do not deny the jurisdiction of this Court, but we contend that it is one which would be more conveniently decided in a Common Law Court.

Sir *R. Baggallay*, Q.C., and Mr. *Robinson*, for the liquidator, were not called on.

Sir W. M. James, L.J., after expressing his opinion that there was a distinct and concluded agreement to accept a certain sum in reference to the claim for office expenses, and that therefore the appeal failed on that ground, continued:—

The second claim which has been brought before me is with respect to the commission. I am clearly of opinion that the Master of the Rolls was right upon that question also. It is the case of a person engaging a servant, and saying, "I engage you for five years, I will pay you £500 a year for that period—that sum is secured to you—and then, in order to give you an inducement to carry on the business effectually, properly, and prudently, I will give you 10 per cent. commission upon the net profits to be

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(1) 14 C. B. (N.S.) 654. 10 Jur. N.S. 239

L. J. J.
1870
In re
English and Scottish Marine Insurance Company.
Ex parte Maclure.

earned by that business." I am of opinion that this was a contract which did not give the servant the right to determine what the extent of the business was to be. He could not call upon the directors to issue new policies, to accept new premiums, or to take new risks, if they were not minded to do it. He could not say, "Such a person has brought in a policy of insurance, and you must accept that." Because, if he had a right to say "You must carry on the business," he would also have a right to say "You must carry on the business in the usual and proper manner," and that would be giving a servant the right of controlling the master in the mode in which he chose to carry on his business. Now, I am quite satisfied that the meaning of the contract was nothing of the kind. It was never intended to give the servant the right of dictating as to the extent of business, whether more or less, or nothing, but he simply took the chance of the company finding it a profitable business and carrying it on. The company had a right to reduce the business to a minimum; and if they had a right to reduce it to a minimum, they had a right to reduce it to nothing—as far as he was concerned.

I was referred to a case at Common Law, *McIntyre* v. *Belcher* (1), where this illustration was given: "If I sell a man all the apples from my apple tree, I have no right to cut down that tree." But that is essentially different from a man saying "I am going to buy and sell apples, and I will give you 10 per cent. upon the profits of the sale of them." That must, of course, depend upon the amount of apples which the man who enters into the speculation will buy, and what price he will be able to sell them at. In such a case the other party could not say, "You are not making profits, because you go to a wrong market and buy upon bad terms; you have not got sufficient capital, and you are selling at a loss in order to get money. Therefore I am entitled to damages for the improper mode in which you carry on your business."

It seems to me this claim is perfectly unfounded. I agree with the Master of the Rolls; and, therefore, this appeal will be dismissed with costs.

Solicitors: Messrs. *Hargrove, Fowler, & Blunt*; Messrs. *Flux, Argles, & Rawlins.*

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(1) 14 C. B. (N.S.) 654. 10 Jur NS 289

Ex parte JOHNSON. *In re* JOHNSON.

L. J. J.
1870
July 30;
August 2.

6 Ex 280
— 33[illegible]
— 338, 361,
371, 397,
6 Ch. [illegible]

Debtor Summons—Bankruptcy Act, 1869, *ss.* 6, 7—*Gen. Ord. in Bankruptcy, Jan.* 1, 1870, *Rules* 158, 162.

An order was made on a debtor summons, that the debtor within seven days should give a bond, with sureties, to pay such sums as should be recovered by the creditors; and it was further ordered that all proceedings on the summons should be stayed, until the Court in which proceedings should be taken for the debt should have come to a decision. The Registrar never gave any notice of the time and place when and where the bond was to be executed. The sureties first proposed having been objected to, the seven days passed without the bond having been executed. The creditors then applied for an adjudication in bankruptcy, which was made:—

Held, that as the order made on the summons stayed all proceedings under the summons unconditionally, the adjudication could not be maintained.

Whether the objection arising from the default of the Registrar in not fixing a time and place for the execution of the bond might not have been surmounted, *quære*.

THIS was an appeal from an order made by the Judge of the County Court of *Norfolk*, and affirmed by the Chief Judge, adjudicating the Appellant *Johnson* a bankrupt.

On the 26th of March, 1870, Messrs. *Harvey & Hudson* issued a debtor summons against *Johnson* for £453 17*s.* 9*d.*, which was served on the 28th. On the 2nd of April *Johnson* filed an affidavit denying the debt, and the Registrar, on the 12th of April, made an order "that the said *W. Johnson*, within seven days from the service of this order upon him, enter into a bond in the penal sum of £912 9*s.* 8*d.*, with such two sufficient sureties as the Court shall approve of, to pay such sum or sums as shall be recovered by Messrs. *Harvey & Hudson* against the said *W. Johnson* in any proceedings taken or continued against him for the recovery of the demand mentioned in the summons, together with such costs as shall be given by the Court in which such proceedings are had. And it is further ordered that all proceedings on this summons shall be stayed until the Court in which the proceedings shall be taken shall have come to a decision thereon."

On the 16th of April *Johnson's* solicitor sent to the Registrar, and also to the creditors' solicitors, notice of sureties, one of the

L. J. J.
1870
Ex parte JOHNSON.
In re JOHNSON.

proposed sureties being the debtor's attorney. On the 18th the creditors' solicitors wrote back to say that the Registrar never accepted the debtor's attorney, and that therefore some one else must be substituted; and on the following day they wrote to say that the other surety could not be accepted. On the 22nd of April the debtor's solicitor sent a notice to the Registrar, and also to the creditors' solicitors, proposing two other sureties. The creditors' solicitors replied that they had filed a Petition for adjudication on the 21st, an act of bankruptcy having on that day been committed by the failure to give the bond within the seven days.

The Judge adjudicated *Johnson* a bankrupt, and his order was affirmed by the Chief Judge in Bankruptcy.

Mr. *Roxburgh*, Q.C., and Mr. *Finlay Knight*, for the Appellant:—

The case turns on the *Bankruptcy Act*, 1869, s. 6, par. 6, and s. 7, and Rules 158 and 162 of the General Orders of Jan. 1, 1870. We contend that it is the Registrar's duty, under rule 162, to give notice of the time and place when and where the bond is to be executed; and that, if he does not, the debtor is in no default, and has not committed an act of bankruptcy. The creditors here were parties and privy to the delay, and cannot take advantage of it: *Ex parte Budd* (1); *Ex parte Brown* (2).

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the petitioning creditor:—

[The LORD JUSTICE JAMES:—Can the debtor be said to have "neglected" to give security when there has been a *bonâ fide* dispute as to the details of the security?]

Yes, "neglect to give security" means no more than "not give security;" it means any omission to give security without wilfully refusing to do so. The debtor ought to have obtained an appointment from the Registrar.

[The LORD JUSTICE JAMES observed that the order was in form an unconditional stay of proceedings in Bankruptcy.]

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(1) 1 M. D. & D. 436.

(2) Mont. & Ch. 177, 227.

L. J. J.
1870
Ex parte
JOHNSON.
In re
JOHNSON.

The Court will not give that effect to it, as it is contrary to the scope of the Act.

Mr. *Roxburgh*, in reply.

SIR W. M. JAMES, L.J.:—

There is great force in the argument that the debtor is not in default because the Registrar never fixed, as he ought to have done, a time and place for the execution of the bond. The difficulty arising from this default of the Registrar might perhaps, however, be got over, as the debtor might have applied to have a time and place fixed. It is, however, unnecessary to decide this point, for I am of opinion that, as the order which is still in force stays all proceedings unconditionally, the adjudication must be annulled.

Solicitors: Mr. *L. Hand;* Messrs. *Whites, Renard, & Floyd.*

Ex parte DIMOND. *In re* WILLIAMS.

L. J. J.
1870
July 30.

18g/710

Liquidation—Injunction—Staying Proceedings in Bankruptcy.

In July, 1869, *D.* recovered judgment against *W.*, and in March, 1870, served him with a debtor summons, to which *W.* did not appear. On the 6th of July, 1870, *D.* filed a Petition for adjudication against *W.*, which was to be heard on the 16th. On the 16th of July, *W.* filed a Petition for liquidation by arrangement, and on the same day obtained an injunction, staying the proceedings in bankruptcy till the 23rd. On the 23rd this injunction was renewed till the 6th of August, the first meeting of creditors under the liquidation proceedings being fixed for the 4th of August. There was no evidence that any of the creditors preferred liquidation to bankruptcy:—

Held, that the injunction ought not to have been granted.

THIS was an appeal, by *C. J. Dimond*, from an order of Mr. Registrar *Spring Rice*, granting an injunction restraining the Appellant from proceeding on a Petition of adjudication, filed by him against *James Williams*, until after the 6th of August.

On the 20th of July, 1869, *Dimond* obtained judgment against *Williams* for debt and costs, amounting together to £568 17*s.* 4*d.*, and on the 18th of March, 1870, issued a debtor summons. *Williams* did not appear to it, and on the 6th of July *Dimond* presented a Petition for adjudication against him. On the 16th of July *Williams* filed a Petition for liquidation by arrangement, and obtained *ex parte* an injunction to restrain proceedings on the Petition for adjudication till that day week. On the same 16th of July *Dimond* applied for an adjudication; but, before the case was closed, the injunction was handed in, and the proceedings were adjourned till the 23rd of July, on which day the Registrar made the order under appeal, continuing the injunction till the 6th of August, the first meeting of creditors under the liquidation proceedings having been fixed for the 4th. The debtor deposed that he had been negotiating with the Appellant, but the so-called negotiation amounted only to this, that *Williams* had made to *Dimond* certain proposals which the latter did not entertain, and there was a complete absence of evidence as to whether any of the creditors preferred liquidation by arrangement to bankruptcy.

Mr. *Reed*, for the Appellant:—

We are entitled to adjudication as a matter of right: Gen. Ord. Jan. 1, 1870, Rules 22, 36, Form IV. There are three cases before the Chief Judge as to such injunction: *Green's Case, Tichborne's Case*, and *Russell's Case. Tichborne's Case*, of which there is a note in the *Solicitor's Journal* for 1870, p. 528, is in our favour, and almost on all fours with the present. The other two are broadly distinguishable. If the creditors choose they can, under section 80, take the proceedings out of bankruptcy. A creditor's Petition has always been preferred to that of the debtor. Even if the creditor were exercising his legal rights harshly, he could not be deprived of them: *Jones* v. *Matthie* (1).

Mr. *Winslow*, for the debtor:—

No laches is to be imputed to the debtor, all possible despatch having been used since he received notice of the Petition for adjudication, up to which time he hoped to settle with the Appellant. A creditor's Petition was preferred, under the old law, to that of the debtor; but it was only because the assignee had a better title under it. It is not desirable that the proceedings in bankruptcy should go on until it is seen whether the creditors pass resolutions or not. If they do, there is an end of the bankruptcy proceedings; if they do not, the injunction drops.

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(1) 11 Jur. 504.

SIR W. M. JAMES, L.J.:—

I am of opinion that this injunction cannot be sustained. The Appellant took his proceedings in due form, and in March last served the Respondent with a debtor summons. It was then competent to the debtor, if he thought fit, to attempt to make an arrangement with his creditors; but up to this time he has done nothing effectual in the way of arrangement. It is said that there has been negotiation between the Appellant and the Respondent; but it cannot be said that there was negotiation when all that took place was, that one party made an offer which the other refused. The Petition for adjudication was presented after ample time had been allowed for arrangement, and when the day for hearing arrives, then a Petition for liquidation is presented by the debtor, not supplemented by evidence that a single creditor prefers liquidation to bankruptcy. I have no right, in these circumstances, to interfere with the creditor's seeking his remedy in bankruptcy. If the majority of creditors should hereafter think liquidation preferable, they can stop the bankruptcy proceedings.

Solicitors: Mr. *J. B. Pittman;* Messrs. *Linklaters, Hackwood, & Addison.*

L. C.
1870
June 15, 29.

12 Eq 21
12 Eq 65,
14 Eq 206
8 Ch 85-7.
16 Eq 250-2
2 Ch D. 550

PHILLIPS *v.* FURBER.

Bankruptcy Act, 1861—*Chancery—Jurisdiction—Inspectorship Deed—Proof of Execution.*

Inspectors claiming as Plaintiffs under a deed of inspectorship registered under the *Bankruptcy Act*, 1861, must prove the assents to the deed of the creditors.

A debtor, by a deed registered in Bankruptcy, covenanted when required to assign his estate to inspectors to be administered as in Bankruptcy. He afterwards became bankrupt. The inspectors filed a bill against the assignee in Bankruptcy, and a mortgagee of the debtor, claiming the balance in the hands of the mortgagee:—

Held (affirming the decision of the Master of the Rolls), that the Court of Chancery would not exercise its jurisdiction between the inspectors and the assignee, as both were subject to the Court of Bankruptcy.

By an indenture dated the 31st of July, 1866, and made between *John Bingham* (the debtor) of the first part, *J. Cooper* and *T. H. Wintle* (the inspectors) of the second part, and the creditors of the said *John Bingham* of the third part, *John Bingham* covenanted to deliver accounts to, and to wind up his estate under the direction of, the inspectors; and he covenanted that the said estate should be administered in accordance with the principles, rules, and practice of the then English bankrupt law, or as near thereto as circumstances would permit, having regard to the terms of the said indenture; that the debtor would, if the inspectors should by writing so require, effectually convey and assign all his estate and effects remaining outstanding to the inspectors in trust to be forthwith realized, and administered and divided according to the law of bankruptcy among the creditors of the debtor, according to the amount of the respective debts which should remain unpaid.

The indenture was executed by the debtor and by the inspectors, and purported to be executed or assented to by a sufficient majority in number and value of the creditors of *John Bingham*, so as to be a valid deed under the *Bankruptcy Act* of 1861; and on the 28th of August, 1866, it was duly registered.

On the 23rd of February, 1867, the inspectors proceeded to serve a notice on *John Bingham*, requiring him to assign his outstanding estate and effects; but this service was disputed.

L. C.
1870
PHILLIPS
v.
FURBER.

The principal part of the estate of *John Bingham* consisted of furniture; and on the 6th of June, 1867, *Charles Furber*, acting under the powers of an assignment made to him by way of mortgage on the 11th of March, 1867, by *John Bingham*, sold this furniture.

On the 6th of November, 1867, *John Bingham* was adjudicated bankrupt, and *T. R. Schweitzer* was appointed assignee in the bankruptcy.

Notice of the inspectorship deed had been given by the inspectors to *Furber*, but nothing else appeared to have been done under that deed until the 18th of March, 1868, when *W. P. Phillips* and *G. Phillips* were appointed inspectors in the place of *Cooper* and *Wintle*; and in May, 1868, the new inspectors filed the bill in this suit against *Furber* and *Schweitzer* and another mortgagee of *John Bingham*, claiming the proceeds of the sale of the furniture, after allowing *Furber* to deduct what was due to him. That amount was at first disputed, but the dispute was settled on the hearing of the appeal.

Schweitzer, in his answer, said that he was informed and believed that the inspectorship deed was not executed or assented to by a sufficient majority in number and value of the creditors, and was advised that it was invalid and an act of bankruptcy; and he claimed the proceeds of the sale of the furniture as assignee.

The suit was heard before the Master of the Rolls, who, on the 11th of February, 1870, dismissed the bill with costs, considering that:—1. The jurisdiction of the Court in such a case was discretionary, and that in this case the estate ought not to be administered in Chancery. 2. That no proof of sufficient assents to the deed of inspectorship had been given, though leave to supply such proof might in a proper case have been granted. 3. That the service of the notice on *Bingham* had not been proved. 4. That the inspectors had been negligent, and ought not to receive any indulgence. (1)

The Plaintiffs appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Higgins*, for the Plaintiffs:—

As to proof of assents, there are deeds of two classes; and if we have not assents under sect. 192, then the deed is good under

(1) See 18 W R 479.

sect. 194, and the parties to it are then in the position of creditors who have obtained advantages from the debtor. No doubt such a deed may be sufficient to support a bankruptcy, but then it must be within twelve months. If only four or five creditors had signed the deed, where is the jurisdiction to set it aside? *Symons* v. *George* (1); *Johnson* v. *Osenton* (2). The deed was sufficient to enable the inspectors to call on *Bingham* to assign, which they did. As to the proof of the assents of the creditors, in *Ex parte Rawlings* (3), which was relied upon by the Master of the Rolls, the assents were conditional. In *Bramble* v. *Moss* (4), and *Waddington* v. *Roberts* (5), the question arose on a point of pleading only. The certificate of the Registrar is *primâ facie* evidence that all the requisites of the Act have been complied with, and that must be taken to be the intention of the Legislature. At all events, we must have leave to supply the requisite evidence.

As to the jurisdiction: this is not a suit to administer this money, but to recover it, and the Court may require the inspectors to submit to account in Bankruptcy. The inspectors must sue in this Court or at law, according as their title is legal or equitable, and our title against *Furber* is equitable only.

Mr. *Jessel*, Q.C., and Mr. *Hastings*, for *Furber*.

Mr. *W. W. Cooper*, for the other mortgagee.

Mr. *Swanston*, Q.C., and Mr. *Cracknall*, for *Schweitzer*:—

We have distinctly challenged the Plaintiffs to prove the deed of inspectorship, but they have not done so, and they have not applied for leave to do so. But, even if they get over that difficulty, the Court will not interfere with an estate which is to be administered in Bankruptcy. There is a complete and convenient remedy in Bankruptcy, and *Furber* was, as to the surplus in his hands, an agent for the Plaintiff, and liable to account in Bankruptcy under sects. 130 or 132 of the *Bankruptcy Act* of 1861. There has never been a suit to compel the performance of a covenant in an inspectorship deed. The property remains in the debtor: *Hobson* v. *Jones* (1); and there is nothing to administer here: *Stone* v. *Thomas* (2). The inspectors and the assignee are all officers of the Court of Bankruptcy, which has full power to decide between them.

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(1) 34 L. J. (Ex.) 187; 3 H. & C. 996. 11 Jur. N.S. 713.

(2) Law Rep. 4 Ex. 107.

(3) 1 D. J. & S. 225. 9 Jur. N.S. 1310

(4) Law Rep. 3 C. P. 458.

(5) Ibid. 3 Q. B. 579.

Sir *R. Baggallay*, in reply.

June 29. LORD HATHERLEY, L.C., after stating that in his opinion the service of the notice on *Bingham* must be taken to be proved, and observing that both parties had been extraordinarily negligent, and that the negligence of the inspectors was shewn by their not even taking the proper course to prove the deed under which they derived their title, continued:—

On looking at the authorities it is quite clear that, though the certificate of the Registrar is *primâ facie* evidence of certain facts having taken place, and of certain affidavits having been filed, and as to the terms required by the Act for the purpose of registration of deeds of this description having been complied with, yet his certificate is not *primâ facie* evidence of the truth of the facts alleged in those affidavits, among which it is important to prove that the adequate number of creditors subscribed the instrument. This is a case of all others in which such proof is singularly necessary, because one cannot help seeing that there is very great ground for doubting the *bona fides* of the deed when one finds that for a long time nothing is done under it in the way of obtaining the assignment from the debtor, and though other proceedings had taken place, it was not until May, 1868, that this bill was filed.

The Master of the Rolls seems to have thought he might have given the Plaintiffs the opportunity of fortifying their title by giving the evidence which ought to have been given in the first instance, but then he thought that the same powers would be given to the Court of Bankruptcy of administering the estate under the deed as would be given in the bankruptcy, and that there was a clear discretion in the Court to say whether the rights should be administered in Bankruptcy or in Chancery, and was of opinion that the Court would exercise the discretion by leaving it to Bankruptcy, as being in such a case cheaper and more convenient than Chancery.

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(1) Law Rep. 9 Eq. 456.

(2) Law Rep. 5 Ch. 219.

The argument before me has mainly turned on whether this is really one of those cases; and upon the whole, though there may be some degree of difficulty about it, I have come to the conclusion that the Master of the Rolls is right in that view, although it is quite true that the Plaintiffs here do not ask the Court to administer the estate, but raise a controversy with reference to the title to property as if they were bringing an action of trover; and although they are right in saying, that when the title has been ascertained the whole matter will be clear between them and their *cestuis que trust*, and the Court of Bankruptcy will be quite adequate to arrange the matter.

[His Lordship then commented on the claims of *Furber*, and stated that it was by no means immaterial that there was now no controversy between either class of claimants and *Furber*.]

The Master of the Rolls, in my opinion, might have dismissed the bill simply because the Plaintiffs had not chosen to prove their deed. Further than that, I think this matter may well be left to the adjudication of the Court of Bankruptcy, there being nothing but two sets of assignees, over both of whom the Court of Bankruptcy will have complete and perfect jurisdiction. But, without in substance altering the decree of the Master of the Rolls, and merely for the benefit of all parties, and to clear the estate of *Furber's* claims, I propose to make an order on this appeal in this form:—That the Master of the Rolls' order be varied, and that the Plaintiff should pay the costs as already directed; that the sum paid into Court by *Furber*, and the additional sum to be paid by him, should be paid to *Schweitzer*, he undertaking to deal with it as the Court shall direct, without prejudice to any application to be made by the Plaintiffs to the Court of Bankruptcy within a month.

Solicitors for the Plaintiffs: Messrs. *C. & C. R. Cuff.*
Solicitors for *Schweitzer:* Messrs. *Linklaters & Co.*
Solicitors for *Furber:* Messrs. *Deane & Chubb.*
Solicitors for other Parties: Messrs. *Ingle & Co.*

STRETTON *v.* GREAT WESTERN AND BRENTFORD RAILWAY COMPANY.

L. C. and L. J. J.

1870

July 13, 19, 20, 21.

Railway Company—Injunction—Old Notice to Treat—Mistake or inadvertence —Value of Land.

7 QB 6

18 Eq 74

A railway company, in 1856, took possession of a meadow, a large part of which belonged to one owner and a small part to another, who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an action of ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed his bill to restrain them.

The company offered to pay the value of the land as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them:—

Held, that, under the circumstances, the company were not entitled to proceed under the notice to treat:

Held, that, under the circumstances, there had been no mistake or inadvertence so as to bring the case under sect. 124 of the *Lands Clauses Consolidation Act*:

Held, that the Plaintiff was entitled to a decree in both suits; and the Plaintiff submitting to have the land valued, and the Defendants preferring such a decree to an injunction, decree made for an inquiry as to the present value of the land, and the mesne profits for six years, and for payment by the company accordingly.

Decrees of *Malins*, V.C., reversed.

MISS *FAWELL*, under whom the Plaintiff claimed, was, in 1856, the owner in fee of a piece of land in *Lot Mead*, near *Brentford*. *Lot Mead* contained rather more than ten acres and a half, of which one *George Clarke* owned nearly nine acres. Miss *Fawell*, as it ultimately appeared, owned 1A. 0R. 4P.; and other persons owned other small portions. *George Clarke* had for many years been tenant of the whole, paying Miss *Fawell* £1 14*s.* a year for her part of the land.

In 1856 the *Great Western and Brentford Railway Company*, after some negotiations with *Clarke*, took possession of the whole of *Lot Mead*, and the solicitors of the company wrote to inquire what was the position of Miss *Fawell's* piece of land. Miss *Fawell's*

L. C. and L. J. J.
1870
STRETTON v. GREAT WESTERN AND BRENTFORD RAILWAY CO.

solicitor delivered an abstract of her title, in which her land was stated to be two and a half acres, but the position was not described, and it appeared that she was unable to ascertain where her land was. Some correspondence took place between her solicitors and those of the company, and also between *Clarke* and the solicitors of the company, in which the company declined to complete with *Clarke* on account of the conflicting claims, and *Clarke* threatened proceedings, and expressed a wish to have the money paid into Court. Miss *Fawell's* solicitors claimed two and a half acres, but it ultimately appeared that these were customary acres, equivalent to 1A. 0R. 4P. statute acres; and in one document she was stated to have twenty and a half acres, but this was a clerical error. In the course of the correspondence Miss *Fawell* expressed herself willing to take £200 an acre for her land. Ultimately *Clarke* was paid at the rate of £200 an acre, and a deed was made in 1859, by which *Clarke* conveyed to the company all such parts, or so much as was or were of freehold tenure of and in all that piece of land formerly called *Lot Meadow*, containing 10A. 2R. 13P., or thereabouts, and delineated in the plan drawn on one of the skins of the indenture of conveyance, save and except nevertheless out of the conveyance intended to be thereby made 1A. 0R. 4P. and 1A. 25P. statute measure, the position and boundaries of which were then unknown, and which were then vested in the devisees of Miss *Fawell* and in *Thomas Jennings* and others. At the same time, *Clarke* gave a bond of indemnity to the company against the claims of any other persons.

Clarke's tenancy was terminated in 1859, by notice to quit from Miss *Fawell*.

In 1859 Miss *Fawell* died, and the present Plaintiff, *Stretton*, claimed under her devisee.

In 1862, Mr. *Stretton's* solicitors wrote to the company requiring a settlement, and the company's solicitors answered that, as far as they were able to learn, Mr. *Stretton* had no interest in *Lot Meadow*; the property was supposed to be intermixed with that of a Mr. *G. Clarke*, but the company had paid no one and had taken no conveyance.

In 1867 the solicitors for Mr. *Stretton* sent an abstract of title to the solicitors for the company, stating that it was sent under the

124th section of the *Lands Clauses Consolidation Act,* and claiming two and a half acres.

In 1868 the Plaintiff, Mr. *Stretton,* brought an action of ejectment against the company for "two and a half acres or thereabouts" in *Lot Mead;* and on the trial the conveyance from *Clarke* was produced, which, according to statements made at the Bar, gave the Plaintiff more accurate knowledge of his rights than he had previously acquired. The company denied the title of the Plaintiff, and said that their possession had been taken without Miss *Fawell's* consent. A special case was settled, which contained statements of several of the facts hereinbefore stated; also that the Defendants entered into possession without complying with the provisions of sect. 84 and sect. 85 of the *Lands Clauses Consolidation Act,* and without the consent of Miss *Fawell;* that the matter stood over for some time in consequence of the difficulty of ascertaining the particular portion of *Lot Mead* in respect of which *Clarke* had paid rent to Miss *Fawell;* that, except as appeared by the documents annexed, the portions of *Lot Mead* claimed by the Plaintiff were not identified until the settlement of the special case. It was stated at the Bar that the position of the Plaintiff's land was ascertained from an old map produced on the settlement of the special case.

The points delivered by the Defendants, as relied upon, were: 1. That the Plaintiff cannot recover in this ejectment. 2. That the Defendants lawfully entered upon the land. 3. That until the Plaintiff was able to identify his portion of *Lot Mead,* the Defendants were in no position to give any notice to treat, nor was the Plaintiff in a condition to claim any compensation in respect of his interest in the land. 4. That, as soon as the Plaintiff was able to identify his land, he should have proceeded to obtain compensation, as directed by the *Lands Clauses Consolidation Act.*

The special case was argued before the Court of Queen's Bench on the 25th of January, 1870, when judgment was given for the Plaintiff, and the judgment was afterwards entered up for the 1A. 0R. 4P. There was no report or record of what took place on the argument, but it was stated by counsel that the question of compensation under the 124th section of the *Lands Clauses Consolidation Act* was argued.

A writ of possession was issued on the judgment, and the sheriff, acting under the writ, took possession of the land, and delivered it to the Plaintiff on the 10th of March. The company had constructed their railway on part of the land, and the Plaintiff, after notice to the company, stretched a rope across the railway, which rope was severed by the trains of the *Great Western Railway Company*.

The Plaintiff thereupon, on the 12th of March, 1870, filed the first bill in this suit against the *Great Western and Brentford Railway Company*, and their lessees and agents, the *Great Western Railway Company*, and the *Thames Steam Tug Company*.

On the same day the solicitors to the company wrote and sent to the solicitors of the Plaintiff a letter stating, that "As the quantity is now settled, the company are ready at once to complete the purchase from your client, paying him, of course, in addition to the purchase-money, interest at 5 per cent. from the time of their entering into possession of the land, and to pay the costs of the suit." The price offered was £200 an acre. To this letter an answer was sent that the Plaintiff required the land, and was not disposed to sell.

Shortly afterwards the Plaintiff was informed that a notice to treat, dated the 2nd of August, 1856, had been served on Miss *Fawell;* and the Defendants' solicitor, in his evidence, deposed that he had personally served this notice on Miss *Fawell*. The Plaintiff and his solicitors deposed that they knew nothing of this notice, and had found no copy of it amongst the papers.

On the 28th of April, 1870, notice was served, on behalf of the company, of their intention to summon a jury for the purpose of ascertaining the value of the land under the notice to treat.

The Plaintiff thereupon filed the second bill in this suit to restrain the company from proceeding to summon the jury.

Both suits came on to be heard before the Vice-Chancellor *Malins*, who dismissed them with costs (1).

(1) 1870. June 6.

SIR R. MALINS, V.C., after stating the principal facts in the case, and the service of the notice to treat, as to which he entertained no doubt, said, that if Miss *Fawell* did not choose to acquiesce in the possession of the company she could have stopped them by injunction, and after the notice to treat had been served, could have compelled them by mandamus to proceed. But she claimed two and a half acres, The Plaintiff appealed.

Mr. *Glasse*, Q.C., Mr. *Graham Hastings*, and Mr. *Murphy*, for the Plaintiff:—

The Plaintiff has established his right at law, and comes here in order to avoid the necessity for continual actions at law. The

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which, at £200 an acre, would amount to £500. It was hardly to be expected that the company would pay such a sum for land which had produced only £1 14*s.* per annum, and His Honour was surprised that the company did not offer some such sum as £100. Anything more irrational than the conduct of the company on the one hand, and of Miss *Fawell* and her advisers on the other, he had never seen. Matters, however, remained unsettled, though the company were in complete possession of the land until 1868, when Mr. *Stretton* commenced his action; but it would have been better to have filed a bill, which probably would have led to a reasonable arrangement, for the Court of Chancery could make a final settlement of these matters in a manner which did not appear to be practicable in a Court of Law.

However, he brought his action. That was absurd enough on his part, but nothing in comparison to the folly of the company in defending it as they did, for there being nothing between them but the question whether the title was to one acre and four perches or to two acres and a half, and the title not being in dispute, yet the company defended the action and went to trial.

A special case was then stated, but His Honour had been unable to find out what was argued or discussed, because the company had admitted that Mr. *Stretton* was entitled to an acre and four perches, and that they were in possession of it, and had not paid for it.

The case, accordingly, was decided in favour of Mr. *Stretton;* and having established his legal title, he seemed to have been so elated with his success, that he and those who advised him seemed almost to have lost their balance, for the very first thing they did was to take out execution, though any man in his senses would know that such a thing would not have a practical result. However, they took out execution, and put the writ into the hands of the sheriff, who took possession by putting a cord across the line. Of course the first train which came broke it, and there was an end to his possession. Of course the company could not submit to this sort of treatment, because, if they were to do so, it would prevent their trains from passing, and if it would stop the railway for a single foot it would stop it altogether. But, finding that this was not sufficient—finding that the proceedings at law had been ineffectual—two bills had been filed in this Court, asking in effect for an injunction which would prevent the use of this land by the railway company and stop the business of the railway, and also the business of the other companies.

Was, then, the Plaintiff entitled to that right? He relied solely on his proceeding at law, by which he established his legal title to one acre and four perches of land, and he contended that thereby the equitable right was decided, and that he was entitled to stop anybody from touching the land without his consent. The course adopted by the Plaintiff was unreason-

L. C. and L. J. J.
1870

STRETTON v. GREAT WESTERN AND BRENTFORD RAILWAY CO.

company saw the difficulties of the Plaintiff, and thought they should be able to keep the land without paying for it. They knew all about the rights of the Plaintiff, and there has been no mistake or inadvertence so as to bring the case under the 124th section of

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able, when reasonable offers had been made by the company to pay the utmost price—£200 an acre—for a bit of land which never produced more than 34*s*. a year; and it was not suggested that the Plaintiff or Miss *Fawell* ever saw the land, or that the land was the object of any kind of enjoyment or pleasure beyond the receipt of 34*s*. a year.

For a Plaintiff to set up so monstrous a case to entitle him to stop a great railway company from using that land, because he would not submit to any reasonable terms, was a thing which His Honour was surprised to have had suggested; and if the law of *England* was in that state, it would be discreditable to the Legislature.

But His Honour was satisfied that it was not the law; and that, although the Plaintiff had got the law against the company by establishing his legal title, there was no equity that could justify him.

Notice to treat had been given, and though for some purposes that did not constitute a contract, still it gave the company the right to take the land, by depositing the value under the 85th section of the *Lands Clauses Consolidation Act*, and made them to all intents and purposes the owners of the land, and nothing then remained but to ascertain the price, and have a conveyance made to the company. Therefore, on the 2nd of August, 1856, this company became entitled to take possession, and Miss *Fawell* was entitled to say that they should not use it or remain in possession until they had settled the price, and she might have filed a bill in this Court, and would immediately have obtained an injunction. Therefore both sides had been negligent in allowing things to remain in this state so long; but it had been as much Mr. *Stretton's* fault as that of the company. Diligence between vendor and purchaser there must be, and *Watson* v. *Reid* (1 Russ. & My. 236) decided that less than a year will disentitle a Plaintiff from filing a bill for specific performance. But if a purchaser entered into possession, and remained in possession, and the vendor had the folly to come to this Court without requiring payment for the land, it was in vain for the purchaser, or either of the parties, to talk of delay. The mutual acquiescence in the delay was as much binding on one as it was on the other.

So far, therefore, as the notice to treat is concerned, the company was the equitable owner, and as owner of the property they must be treated; and Mr. *Stretton*, the Plaintiff, must be treated as the person entitled to be paid the price, to be ascertained in the mode prescribed by the *Lands Clauses Consolidation Act*.

But even if that had failed, if there had been no notice to treat, and the company had done nothing to put themselves in proper possession of the land, then it was equally clear that the 124th section of the Act would apply. The railway company had intended to act in good faith, and to do justice to all parties; but finding that, from some mistake or inadvertence, they were in possession of a very small piece of land, for which money would compensate, they were not bound, because they found that the owner would not take a

L. C.
and L. J. J.
1870

STRETTON
v.
GREAT
WESTERN AND
BRENTFORD
RAILWAY CO.

the *Lands Clauses Consolidation Act: Martin* v. *London, Chatham, and Dover Railway Company* (1). They have never paid any money into Court, as they might have done, and have left the Plaintiff to make out his title. It is not true that the Plaintiff has stood by and has allowed the company to build on his land. The company took possession, and have ever since defied, and still defy, the Plaintiff. As to the notice to treat, why did the Defendants not produce it until after the bill in this case was filed? That cannot form a defence in equity. If they really did give this notice to treat, their defence to the ejectment is incomprehensible. The notice to treat does not constitute a contract, but merely enables the company to make a contract for the purchase. Nothing was done on this notice to treat, and, so far from acting on it, they denied the Plaintiff's title, and always refused to pay him anything until after they were defeated in the ejectment. Whether they did or did not take possession with the consent of *Clarke*, the special case finds that they took possession without the leave of Miss *Fawell*. If they rely on the 124th section, they might have

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reasonable offer, to accede to a demand of the monstrous and iniquitous nature which had been made in this case. It had been proved to the satisfaction of His Honour that the company entered into possession with the acquiescence of Miss *Fawell*, and, therefore, even if they had not done it by mistake or inadvertence, still it would be within the 124th section.

It had, however, been argued that it was not within this section, because they did not take it by mistake or inadvertence. But His Honour would put the most liberal interpretation on the section, and would say, any oversight or accident which prevented them from paying that which it was clear they were competent to pay, and might have been anxious and willing to pay, would fall under the head of mistake. Now, the mistake here was that two and a half acres were claimed, and this was not finally ascertained until the final decision at law of the 25th of January last, less than six months ago, and it therefore came within the 124th section of the *Lands Clauses Consolidation Act.*

The only thing decided by the action was as to the extent of the Plaintiff's land; and if the argument of the Plaintiff was acceded to, he might demand £40,000, or even £400,000, as he could put this company at his mercy. This demand was founded in injustice, and was contrary to law. The first bill, therefore, had altogether failed, and must be dismissed with costs.

As to the second bill, the cases which were cited: *Richmond* v. *North London Railway Company* (Law Rep. 3 Ch. 679) and *Hedges* v. *Metropolitan Railway Company* (28 Beav. 109), had no bearing. That bill was a gross abuse of the right of suit in this Court, and must also be dismissed with costs.

(1) Law Rep. 1 Ch. 501.

moved to stay execution: *Hyde* v. *Mayor, &c. of Manchester* (1). But all right to proceed under that section is swept away by the action, and the Defendants cannot set up any other defence.

Mr. *Pearson*, Q.C., and Mr. *C. T. Simpson*, for the *Great Western and Brentford Railway Company*:—

We admit that the company has made mistakes, but will this Court allow the Plaintiff to take advantage of them and extort a large sum from the company? Miss *Fawell* must be taken to have acquiesced in the possession by the company: her solicitors sent an abstract of title, and she was willing to sell. The 68th and 85th sections of the Act apply to this case: *Marquis of Salisbury* v. *Great Northern Railway Company* (2); *Burkinshaw* v. *North Western Railway Company* (3); *Adams* v. *London and Blackwall Railway Company* (4). If not, sect. 124 is especially framed to meet such a case.

There was no dispute as to the title, but only as to what the company was to pay for. After such long acquiescence this Court will not interfere: *Somersetshire Canal Company* v. *Harcourt* (5). In fact, the company might have restrained the Plaintiff from issuing execution on his judgment; and the only case the Plaintiff can set up is, that the company have been slow in applying to this Court for an injunction. What could the company do but summon a jury to assess the value of the land, which they did as soon as they knew what the land was? Directly the bill was filed, the company offered to pay £200 and interest, which was a very fair offer.

Mr. *Osborne*, Q.C., and Mr. *H. A. Giffard*, for the *Great Western Railway Company*:—

We were not parties to the action at law, and the Plaintiff has no right against us. He has allowed us to take possession under the *Brentford Company*, and to execute our works without telling us of his claim: *Bell* v. *Hull and Selby Railway Company* (6); *Graham* v. *Birkenhead, &c., Railway Company* (7).

(1) 12 C. B. 474; 5 De G. & Sm. 249.
(2) 21 L. J. (Q.B.) 185; 16 Jur. 740.
(3) 5 Ex. 475.
(4) 2 Mac. & G. 118.
(5) 2 De G. & J. 596.
(6) 1 Railw. Cas. 616.
(7) 2 Mac. & G. 146.

L. C.
and L. J. J.
1870

STRETTON
v.
GREAT
WESTERN AND
BRENTFORD
RAILWAY CO.

Mr. *Stock*, for the *Thames Steam Tug Company.*

Mr. *Glasse*, in reply:—

The other Defendants are agents for the principal Defendants, and the *Great Western Company* might have obtained leave to come in and defend the ejectment. We have succeeded at law, and the value of our land is what such land is worth at the present time, not in 1856, which is the value offered to us: *Martin* v. *London, Chatham, and Dover Railway* (1); *Walker* v. *Ware, Hadham and Buntingford Railway Company* (2).

[Counsel for the Plaintiff, in answer to the Court, said that the Plaintiff would submit to a decree for payment of the present value of the land and of the amount of mesne profits for six years, and counsel for the Defendants said that the Defendants would prefer that decree to an injunction.]

LORD HATHERLEY, L.C.:—

We are somewhat surprised to find that the Vice-Chancellor appears to have regarded the Plaintiff in the present case as a wrongdoer, or as a person asserting rights (which he unquestionably had) in an unjustifiable manner, which could not be sustained in this Court.

The Plaintiff is now, beyond all dispute, the owner of 1A. 4P. of certain land, which has been taken and used by the *Great Western and Brentford Railway Company*, and over which at present the trains of the *Great Western Railway* are running:— [His Lordship then stated the facts of the case.]

The company acted consistently throughout; there was a persevering endeavour on the part of the company to hold the land without paying for it; for, although there appears to have been a good deal of blundering, they had this conveyance from Mr. *Clarke*, and he told them distinctly what it was they were paying him for. They do not seem to have taken any trouble to elucidate the matter, but, on the contrary, they played with the mistakes that were made on the side of Miss *Fawell*, and held her at arm's length. If they did not choose to take their title from Miss *Fawell*, they might easily have paid the money into Court, with

(1) Law Rep. 1 Ch. 501.

(2) Law Rep. 1 Eq. 195. 35 Beav 52 12 Jur. N.S. 18.

respect to the non-payment of which there has been no reasonable excuse suggested in argument.

At last an action of ejectment was brought. The Vice-Chancellor thought the Plaintiff was in the wrong, but really I have not the slightest notion what other course was open to him. It had been said that Mr. *Stretton* might have proceeded under the 68th section of the *Lands Clauses Consolidation Act*, but the company said that they had never given any notice to treat, and there is no reason to believe that Mr. *Stretton* knew anything about it; and, in my opinion, both sides believed that there was no such notice.

Under these circumstances Mr. *Stretton* brought his action of ejectment, obtained judgment, and was put into possession. But the Defendants do not seem to have cared about it, and set all law at defiance; and the *Great Western Company* simply continue to run their trains over the land. They did not offer to pay the money or buy the land; they did not talk of the notice or take any proceeding under the notice, which they afterwards managed to rake up when the suit was instituted, but they in effect said that they did not care about the law and would not pay the Plaintiff.

I am surprised that the Vice-Chancellor should have thought that the Plaintiff did wrong in any of the steps he took, or that the company did otherwise than extremely wrong in bursting through his property with their trains, which, of course, could not be stopped except in a formal way, so as to shew that the Plaintiff asserted his rights; and when the persons employed by the company came *vi et armis* to deprive him of his right, what could he do but file his bill to restrain them? It is not contrary to the course of the Court to grant relief in such cases; and the Court has often, in the case of railway companies, granted relief to prevent their violent user of those powers with which the Legislature has clothed them, and has taken care to do that which was right between the parties.

The bill accordingly is filed, and then for the first time there is an offer made to pay for the land—not the present value, but the value of the land as it existed in 1856, and interest for the fourteen years—the company having determinately appropriated it, and used it from that time down to the present.

Then the question is, whether the Plaintiff was bound to accept that, and I think he was not. He not accepting it, they find out the old notice to treat, serve a notice and issue a warrant for a jury on this notice, dated in 1856, which notice they denied the existence of during the trial of the ejectment, and then they say they will have the land valued, as if nothing had happened, and as if this property had been properly acquired by them, and the mere formal payment had been delayed.

The Plaintiff then filed his second bill. Of course in such cases an injunction as to user of a railway is a serious matter. With regard to what is said as to public interests, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public in using something that is provided for their convenience is to be upheld at the price of saying that property is to be confiscated for that purpose. A man who comes to this Court is entitled to have his rights ascertained and enforced, however inconvenient it may be to third persons, to whom the use of his property may be very convenient.

Now, the course pursued by this Court in cases of injunctions was considered very maturely by Lord *Westbury* in the case of *Isenberg* v. *East India House Estate Company* (1), in which the subject was dealt with accordingly, by directing an inquiry as to the proper amount of compensation to be paid, by way of damages, for the injury complained of. In this case an injunction is asked for, which would give the Court a right to order payment of damages; and it being clear that the Plaintiff would be entitled to an injunction, or to the relief which we have proposed, and the Court having the right to impose on the Plaintiff the alternative of submitting to receive damages, we only refrain from granting the injunction because the Plaintiff, having submitted to have the land valued, and the Defendants preferring that to an injunction, without any consent on either side, we think it right to deal with the first suit in that way, and to say that, the Plaintiff submitting to have the present value of the land recovered in ejectment ascertained by the Court, including what is proper to be paid by way of mesne profits in respect of the user of such land by the Defen-

[illegible]

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(3) 33 L. J. (Ch.) 392. 10 Jur. N.S. 221

dants for six years before the filing of the bill; and the Defendants' submitting to such valuation and account in preference to an injunction, let the account be taken and payment be made accordingly by the *Great Western and Brentford Company.* In the second suit an injunction will be granted. The Plaintiff will have the costs as against the two first companies; as against the *Thames Steam Tug Company* the first bill will be dismissed without costs.

SIR W. M. JAMES, L.J.:—

In this case it appears to me that the contention that the possession of the land was by consent under the notice to treat, which has been the topic most urged upon us on behalf of the Defendants, is totally out of the question. It was the very thing to have been tried at law, if it could have been established, because if there had been possession of the land by consent under the notice to treat, it would have been an answer at law to the action. But the company deliberately elected to put their case on a different footing—deliberately elected to state in so many words that the possession of the land had been taken without such consent; and it appears to me that it would be the worst possible example if litigants in the position of this company were permitted to make a statement in a Court of Law so deliberate as that, with full knowledge of all the facts, and were then permitted to escape the consequences by setting up something which was within their own knowledge at that time.

The defence of acquiescence seems to me to be equally out of the question. It never was, till the special case was settled, within the power of the Plaintiff to shew that any part of his land was ever touched by the works, and therefore it was out of his power to take any proceedings under the different sections of the Act of Parliament to which we have been referred. The difficulty that was thrown in his way throughout was, that he could not shew where his land was; and, trusting to this, the contention raised in one of the points in the ejectment was, that the Plaintiff's title had always been disputed, because it was supposed that it would be out of his power to have distinguished the exact boundary of the land.

The company, it is to be observed, did buy nine acres out of a ten-acre field; they did know that another man had another

L. C.
and L. J. J.
1870
STRETTON
v.
GREAT
WESTERN AND
BRENTFORD
RAILWAY CO.

acre, and they were therefore bound, at their own risk and peril, not to invade such other acre. It is suggested that the Plaintiff ought to have known, and ought to have told them, what was the position and what were the boundaries of his acre; but the railway company certainly ought to have known the boundaries of their nine acres which they had bought from the man, who knew all about it—who, in point of fact, told them he knew that the exact measurement of the Plaintiff's land was one acre and four perches, and who afterwards, as it turned out, did know, and could point out the very position of every bit of the Plaintiff's land; and it is noteworthy that the Defendants have in their works almost entirely avoided the Plaintiff's land, possibly from a knowledge of where it was. It is only on a very small portion of the Plaintiff's land that they have made any actual works. That small portion, however material to them, however they came to use it, they did appropriate at their own risk and peril.

The Plaintiff was at law entitled to recover it. He has recovered it, and is now entitled to the same equitable protection and relief as any other owner would be; and that equitable relief and protection, in my opinion, is such as the Lord Chancellor has pointed out in his judgment.

Solicitors: Messrs. *Sympson & Warner;* Messrs. *Wyatt & Hoskins;* Messrs. *Young, Maples, & Co.*

LAND CREDIT COMPANY OF IRELAND v. LORD FERMOY.

L. C.
and L. J. J.
1870
July 20, 21.

Directors—Fraud—Meeting—Knowledge—Liability—Bill of Review.

The directors of a company, part of the business of which was to make loans, appointed an executive committee. The committee, in order to raise the price of the shares, bought shares in the names of the secretary and another, and in order to pay for these shares drew cheques on the bankers of the company. These cheques were reported to a meeting of the directors as having been drawn for loans and approved of by them, and the money was applied accordingly. There was evidence that the transaction was explained to some of the directors; but one of the directors was present during part of the meeting only, and denied all knowledge of the transaction:

L. C.
and L. J. J.
1870

LAND CREDIT
COMPANY OF
IRELAND
v.
LORD FERMOY.

The Master of the Rolls held the directors generally liable to repay the money to the company; but, on appeal :—

Held, that the director, who denied all knowledge of the transaction, was, under the circumstances, not liable to repay the money.

Quære, whether leave will be given to file a bill of review when, after decree, an important witness states that he has made a mistake in his evidence in the suit.

6 H.L. 383
20 Eq 225.
232–5
5 Ch D 418
441.
6 Ch D. 380
10 Ch D 510
14 Ch D 344

THIS was an appeal by *Henry Munster*, one of the directors of the *Land Credit Company of Ireland, Limited*, against a decree of the Master of the Rolls ordering payment by the directors of £3739 to the official liquidator, and also against an order refusing leave to file a bill of review.

The *Land Credit Company of Ireland* was registered, under the *Companies Act*, 1862, on the 25th of April, 1864.

The capital of the company was to be £1,000,000, of which £500,000 was to be first raised by issuing 10,000 £50 shares.

The memorandum of association stated, amongst the objects for which the company was established: (9.) "To negotiate loans of every description, and to buy, sell, or loan on all descriptions of freehold, leasehold, or other properties, on all descriptions of produce or merchandise, and of stocks, shares (including shares issued by the company), bonds, mortgages, debentures, or obligations on its own account, or for a commission (not being purely speculative transactions for the rise or fall in prices, and in which it has no other interest or time bargains, or the ordinary business of a stockbroker or jobber), and to re-issue any such stock, shares, or other securities with or without the company's guarantee."

By the articles of association the usual provisions were made for issuing shares, for the appointment of directors, and for the management of the company, and power was given to the directors to make advances as above mentioned; and by Art. 109 the directors were authorized to delegate any of their power to committees, consisting of two or more members, as they might think fit, and any committee so formed was to conform to any regulations which might be imposed by the directors.

The company was accordingly formed, and on the 2nd of May a meeting of the subscribers was held, at which Lord *Fermoy* and fifteen other persons were appointed directors; and on the 11th of May, 1864, the present Appellant, *Henry Munster*, was appointed a director.

L. C.
and L. J. J.

1870

Land Credit
Company of
Ireland
v.
Lord Fermoy.

On the 20th of May it was resolved, at a meeting of the board of directors, that a sub-committee be appointed to consider the appointment of a manager, as also "to investigate some business proposals which had been offered to the company;" the committee to consist of Lord *Fermoy*, Lord *Otho Fitzgerald*, Mr. *Finch*, and Mr. *Corry*. At the next meeting it was resolved that Mr. *Collins* should be elected a member of the executive committee. Thenceforward the sub-committee appeared to have been called the executive committee, and from time to time matters of business as to loans and other matters were attended to by that committee, and the committee also made reports to the board.

On the 24th of May the directors passed a resolution that all cheques drawn by the board should be signed by two directors and countersigned by the secretary, and that all payments on account of the company should be voted at board meetings.

On the 18th of May 7340 shares in the company were allotted, and a settling-day was obtained from the committee of the *Stock Exchange*.

The executive committee, with the intention, as the bill alleged, of raising the price of shares in the market and keeping up a fictitious appearance of credit, determined to employ the money of the company in the purchase of shares, and brokers were directed to purchase shares in the company to the number of 535, at a premium; and in order, as the bill alleged, to conceal the irregularity of the transaction, the executive committee determined to make use of the names of the secretary, *F. A. Oliphant*, and of *F. Costelloe*, a friend of *J. Suche*, the manager, as purchasers of the shares, and untruly to represent the payments in respect of such transaction in the company's books as loans to *Oliphant* and *Costelloe*. The price of the shares was £3739, and to meet this sum a cheque for £2000, dated the 30th of July, 1864, was, by order of the executive committee, drawn on the *National Bank*, as bankers of the company; a similar cheque for £1733 11*s.* 3*d.* and a similar cheque for £5 8*s.* 9*d.* were also drawn. Each cheque was signed by two directors, and countersigned by the secretary, *F. A. Oliphant*.

A meeting of the directors was held on the 2nd of August, and on the agenda paper were the following:—" Secretary's report:

cheques signed by executive committee;" and further down in the agenda paper: "Loans to Mr. *Costelloe* and Mr. *Oliphant*;" and in the minute-book of the company appeared an entry for that day: "The secretary reported that the following cheques had been signed by the executive committee, which were approved:

$$\left.\begin{array}{r}\text{“£2000 0 0}\\ \text{1733 11 3}\end{array}\right\}\ \text{£3733 11 3;”}$$

and on the agenda paper, in the handwriting of Lord *Fermoy*, "£3733 11*s.* 3*d.* in all, sanctioned."

At this meeting, Lord *Fermoy* was in the chair, and eight other directors, including Mr. *Munster*, signed their names as having attended; but three of them, Mr. *Corry*, Mr. *Munster*, and Mr. *Vereker*, were not present at the beginning of the meeting. According to the evidence for the Plaintiffs, the transaction respecting the shares was not explained to the directors whilst sitting as a board, but had been explained by Lord *Fermoy* to those present before the meeting began; and the secretary deposed that, after the formal conclusion of the meeting, Mr. *Corry*, Mr. *Munster*, and Mr. *Vereker* inquired why the two cheques had been drawn; the transaction was explained to them, and they expressed their disapproval.

Mr. *Munster*, in his answer and affidavit, said that he was passing through *London* on other business, and was present for a short time at the meeting of the 2nd of August. He had no recollection whatever of the cheques in question having been mentioned, and denied that he knew anything about them, or that they were explained and approved, or passed, at any time while he was present at any meeting. He further stated that, if he had suspected any such proceedings, he would not have remained a director, and that he did not know of the purchase of the shares until he perused the bill in this suit.

Mr. *Corry*, in his answer, said that he believed that the alleged conversation after the meeting of the 2nd of August did take place in the presence of himself, *Munster*, and *Vereker*, and that he protested against the transaction; and in an affidavit filed by him he repeated that, after the meeting of the 2nd of August was broken up, he was informed, but he did not recollect by whom, for what purposes these cheques were signed, and that he then and there protested against their being so applied. Mr. *Vereker*, in his answer, said that the explanation was not given after the meeting of the 2nd of August, but at a meeting of the 13th of September, and that he then expressed his disapprobation of the transaction. It appeared by the books that Mr. *Munster* was not present at the meeting of the 13th of September.

The minutes were confirmed at a subsequent meeting, at which Mr. *Munster* was not present.

The board met every week, and at several of the meetings cheques were reported to have been drawn by the executive committee; at one meeting, in July, for upwards of £24,000, and at a meeting in August, for £11,437.

The cheques for £2000, £1733 11*s.* 3*d.*, and £5 8*s.* 9*d.*, were paid to accounts at the *National Bank* in the names of *Oliphant* and *Costelloe*, and out of the proceeds the shares were paid for; and the shares were transferred, 235 into the name of *Oliphant*, and 300 into the name of *Costelloe.*

In 1865 the company was ordered to be wound up, and on the 15th of March, 1867, the bill in this suit was filed by the official liquidator, in the name of the company, against all the directors, praying that they might be ordered to repay the £3739.

The Master of the Rolls made a decree accordingly against all the directors, as reported (1).

A Petition, asking for leave to file a bill of review, or supplemental bill in the nature of a bill of review, and that the original cause might be reheard, together with the bill so filed, was then presented by Mr. *Munster*, stating the filing of the bill in the suit and the decree, and the evidence of *Oliphant*, the secretary; and that since the decree in the suit *Oliphant* had stated that he had made a mistake in his evidence, and that the explanation stated by him to have been given on the 2nd of August to Mr. *Corry*, Mr. *Munster*, and Mr. *Vereker* was, in fact, given to Mr. *Corry*, Mr. *Vereker*, and another director (Mr. *Trower*) at a meeting on the 13th of September.

In support of this Petition, affidavits by Mr. *Vereker*, Mr. *Oliphant*, and Mr. *Munster* were filed; and in his affidavit Mr. *Oliphant* stated that, in June, 1869, Mr. *Vereker* called on him, and recalled

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(1) Law Rep. 8 Eq. 7.

L. C. and L. J. J.
1870

LAND CREDIT COMPANY OF IRELAND
v.
LORD FERMOY.

to his mind various circumstances which he had overlooked, and after deliberately reconsidering the matter, he felt sure that he had unconsciously fallen into error in his affidavit in the suit.

The Master of the Rolls dismissed the Petition with costs (1).

Mr. *Munster* now appealed against the decree in the suit, and against the order dismissing the Petition.

Mr. *Jessel*, Q.C., and Mr. *Hemming*, for the Appellant:—

The decision against Mr. *Munster*, if supported, will carry to a most unreasonable length the doctrine of the liability of directors as trustees. The cheques may have been sanctioned at a board meeting, but no explanation was given, and there is nothing to fix Mr. *Munster* with notice of any impropriety. The executive committee having asked for cheques, is every member of the board to be held liable if the drawing them was a breach of trust? Directors are not like common trustees; they must carry on business in the ordinary course of mercantile business, and they cannot severally examine into the propriety of every cheque. The executive committee deceived them by telling them that the money was wanted for loans to *Costelloe* and *Oliphant*, which was a legitimate purpose. The executive committee were not agents for whose acts the board was liable, but delegates under the powers of the deed of settlement. *Joint Stock Discount Company* v. *Brown* (1) does not go near the length of this case; for there all parties knew the real nature of the transactions. Suppose Mr. *Munster* was present, there was nothing to cause suspicion that the cheques were not wanted for a proper purpose. But, on the evidence, we say that he was not present, and that there is no pretence for saying that Mr. *Munster* actually knew of these proceedings. It is not even alleged that he was present when the cheques were approved of. In the Court below, reliance seems to have been placed on the answers of some of the other Defendants. We might contend that they were not evidence, but we waive the objection. The story is, that the directors who came early had the matter explained to them, and that three who came late also had it explained to them, as to which there is no evidence but *Oliphant's*, even if the further evidence be rejected, for no doubt Mr. *Corry* has made a mistake on a point immaterial to himself, as to the time when he received the information, and has confused the days. The same principles should be applied to directors as to trustees, and they are only bound to employ the same diligence which they would have employed in their own business: *Mendes* v. *Guedalla* (2); *Turquand* v. *Marshall* (3). Merely passing a cheque does not give notice of its object. No sufficient distinction was taken by the Master of the Rolls between the case of Mr. *Munster* and that of other directors. He always denied that he had any notice.

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(1) 1870. Feb. 21. WN (1870) 56

LORD ROMILLY, M.R.:—

The principle is quite clear that the Court will not allow such a rehearing to take place, or a bill of review to be filed, unless upon the discovery of evidence which could not have been obtained before. In a case of this description, if the Court had proceeded solely upon the evidence of one witness, and that witness had been convicted of wilful and corrupt perjury, then I do not say that the Court would not rehear the case. But I am confident the Court would never do so in a case where all the witnesses, upon whose evidence the Court had proceeded, came forward and said they were mistaken, and upon further consideration they found they had not told the truth. The most serious consequences would arise if the Court were to allow a cause to be reheard upon evidence of that description.

It is quite clear that if the same steps had been taken, before the hearing, to sift the evidence (assuming it to be a mistake) as those which were afterwards taken, the matter would have been set right, and a cross-examination might have established the whole case differently from what it is at present.

Rehearing a cause upon obtaining fresh evidence is a most dangerous practice. It is the duty of suitors to bring forward all their evidence at the first, and nothing would be more mischievous than to allow this principle to prevail, that a person should endeavour to get a case heard upon imperfect evidence, and trust to succeeding on that evidence, and then, when it is found that he has not succeeded, to bring forward further evidence. Assuming all that is said to be correct, with a little care and diligence the whole thing could have been put before the Court as it stands at present.

But I entertain very considerable doubts about the accuracy of it, and I entertain very considerable doubts about the ulterior question. The result is that, in my opinion, this is not a fit case for me to allow a rehearing upon the affidavits and the evidence which is now stated to me. And, upon the whole, as the case stands now, I do not think the Court has miscarried in justice in the decree it has made, and I must decline to allow the matter to be reheard upon this ground.

It is a very important question, undoubtedly, and I have certainly this satisfaction, that my refusing this application does not preclude the Petitioner from taking it further, and obtaining the opinion of the Lord Chancellor upon the subject, whether it is a fit and proper case to be reheard in this state of circumstances; but, on the application before me, I dismiss the Petition with costs.

As to the bill of review, we shew that the Court has been

(1) Law Rep. 8 Eq. 381. (2) 2 J. & H. 259. (3) Law Rep. 4 Ch. 376.

8 June 1878

L. C. and L. J. J.
1870

LAND CREDIT COMPANY OF IRELAND. *v.* LORD FERMOY.

misled, and we ask leave to have it set right: *Needham* v. *Smith* (1). This new evidence would be admissible on a rehearing; and we have, at any rate, a right to file a supplemental bill in the nature of a bill of review to bring it before the Court. In a very recent case of *Bawden* v. *English* the Lord Chief Justice *Cockburn* granted a rule *nisi* for a new trial, on an affidavit that the principal witness for the Defendant had since the trial stated that his evidence was false, and observed that if the fact were so the verdict could not stand. This is precisely in point.

Sir *R. Baggallay*, Q.C., and Mr. *Jackson*, for the Plaintiff:—

The rules as to directors ought to be at least as stringent as those by which trustees are bound. Every director who was present when these cheques were approved of is liable, and anything short of that would lead to fraud. The fact that the advance was to be made to the secretary ought to have raised suspicion. If it was proved that a director was misled he might escape, but not where he was merely negligent. He was appointed and paid by the shareholders to protect them, and he ought to have done so. He is not justified in relying on the executive committee, for they had not full powers, and were subject to the directors generally. If a director who was present at a meeting when an illegal thing was done, is not liable, when is a director to be liable? He might have seen what was to be done, and he cannot be allowed to say that he is not liable because he did not attend, or because he trusted his colleagues. Could he escape by saying that he was asleep at the time? Either the name "director" means something or it means nothing. If the directors are to rely entirely on the manager or secretary, what is the use of directors? They had a veto on the doings of the executive committee, and that must mean something. Moreover, the board never made a proper delegation of their functions to this committee, and were bound to attend to the business.

LORD HATHERLEY, L.C.:—

I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company. But we must look at the nature of the business of this company.

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(1) 2 Vern. 463.

It appears that under the trust-deed they had the power of making loans, and the power of appointing a committee, to whom they might delegate all the powers they thought proper; and that, in fact, a committee was appointed, called the executive committee, and that the functions of the directors were transferred to this committee, so far as regarded proposals for business, and for loans and other matters. The committee from time to time reported to the directors, and the directors had a right to ask proper questions, and to decide thereon according to their discretion; and the directors must be tried as any other trustees accused of neglecting their duty. Now, setting aside all that was concealed by the executive committee, there was laid before the board a statement that the cheques for £2000 and £1733 11*s.* 3*d.* had been signed by the executive committee, and then, before the chairman, a paper, on which was written, amongst the agenda for the day, "Loans to Mr. *Costelloe* and Mr. *Oliphant.*" This we must take to have been read out, and it must have been stated that these loans had received the sanction of the executive committee, and that the sanction of the directors was sought. Now, suppose that Mr. *Munster* is bound by everything which appears upon the books to have been discussed by the directors? He must be taken to have known of these loans; and the question is, how far he ought to have pursued his investigation? If there had been anything unreasonable or extravagant in the matter, or the loans had been of an unusual amount, one would expect further questions to be asked, but the loans amounted to £3733 only, and it would have been useless to ask the executive committee, who had already recommended the loans, whether the security was good. But the charge is, that the directors did not see to the application of these loans. The money was actually placed to the credit of these persons, and, in form, all was done that was recommended by the executive committee. The real transaction was, that the executive committee had adopted the very improper course of purchasing shares in their own company, and now wanted to pay for them by means of these apparent loans to *Oliphant* and *Costelloe.*

But it would be carrying the doctrine of liability too far to say that the directors are liable for negligence, not because they did not ask whether *Costelloe* and *Oliphant* were solvent and respectable, but because they did not inquire what they were going to do with the money. To do this would be carrying the doctrine of the responsibility of directors far beyond anything laid down in this Court. Whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable.

The question, then, is, whether this was concealed. *Oliphant* says it was not; but this is denied by the evidence of others, and I think that it was in fact concealed: it was very unlikely that the executive committee would disclose their scheme to the other directors. Mr. *Munster* has denied that the matter was ever brought before him, or that he had any knowledge of the transactions; and I give full belief to his denial.

The Plaintiffs have failed to establish against Mr. *Munster* the thing which it was essential for them to establish; and the bill, as against him, must be dismissed with costs.

No doubt we have here a great advantage in finding the facts as against one Defendant picked out, instead of being mixed up with the evidence relating to other Defendants of different degrees of complicity, and no doubt we have thus been enabled to come to a more satisfactory conclusion. There will, of course, be no costs of the appeal.

As to the Petition for leave to file a bill of review, it is a very peculiar case, and no doubt the circumstances were very suspicious. But the question raised on this Petition has ceased to be material except as to costs, and we think that there ought to be no costs of that Petition.

Sir W. M. James, L.J.:—I quite concur.

Minutes:—Reverse decree and dismiss bill with costs as against *Munster*. Discharge order made on Petition of rehearing before the Master of the Rolls. No costs of appeal.

Solicitors for the Appellant: Messrs. *Ward, Mills, & Witham.*
Solicitor for the Respondents: Mr. *H. Gover.*

CITY BANK *v.* LUCKIE.

L. C.
1870
July 6, 13.

8 Ch 224
— 967
9 Ch 597
10 Ch 199
7 App Cas

Acceptances—Insolvents—Mortgage.

K. & Co. accepted bills for *L. & Co.*, and *L. & Co.* mortgaged to *K. & Co.* an estate in *Guiana* to secure a cash credit, granted by *K. & Co.*, to the extent of 75,000 dollars. There was a general current account between the two firms. *K. & Co.* and *L. & Co.* each became insolvent:—

Held, that, under the circumstances, the mortgage was a security for money advanced to meet the bills: and

Held, that the holders of the bills were entitled to the benefit of the mortgage securities, and to have the money received from the mortgage security applied in payment of the bills.

Decree of *Stuart*, V.C., reversed.

G. J. LUCKIE carried on business in *London* under the firm of *Luckie Brothers & Co.*; and *E. Kynaston* and *R. Sutherland* carried on business in *London* under the firm of *Kynaston, Sutherland, & Co.* In the year 1866, *Kynaston, Sutherland, & Co.* accepted bills for £12,500, drawn upon them by *Luckie & Co.* By an instrument purporting to be a mortgage, and as a record of the Court of *British Guiana*, in the form used in *Guiana*, dated November 25, 1865, after reciting an agreement between *Luckie* and *Kynaston*, as representing *Kynaston, Sutherland, & Co.*, that *Kynaston* would grant to *Luckie* a current cash credit to the extent of 75,000 dollars, to be secured by mortgage, and that *Luckie* had already received 5000 dollars on account of such cash credit, and that it had been agreed that all other sums to be thereafter advanced to *Luckie* upon the said cash credit, under deduction of payments or proceeds of sales of produce, should form and be from time to time the capital secured by this mortgage, it was declared that *Luckie* became bound to pay to *Kynaston* such sums of money as might be due under the mortgage, not exceeding the said sum of 75,000 dollars, within six months after demand; and as a security for the payment of the several sums, principal and interest, secured by this mortgage, *Luckie* bound his person and property in general, and more especially with right of first mortgage a certain plantation in *Guiana*, called *La Jalousie*, in order that, should any default be made by *Luckie* in the strict payment of the several sums of money secured by this mortgage, the said *E. Kynaston* might foreclose the mortgage, proceed in execution against the said property, and recover from the sale thereof the full amount of capital and interest due by *Luckie* under this mortgage.

It was alleged by the Plaintiffs that these bills were accepted upon the agreement and understanding that payment of them was secured by this mortgage. This was denied by *Luckie,* who said in effect that the firms had other dealings together, and that the mortgage was merely to secure the cash balance, and that each acceptance was the subject of special arrangement. There was, however, a current account between *Kynaston, Sutherland, & Co.* and *Luckie & Co.,* in which, amongst many other items, the amounts received and paid for other bills accepted were entered; and it was admitted by *Kynaston* that he had accepted the bills in question in the ordinary course of business, and on the faith that any money he might advance for taking them up would be secured by the mortgages.

Luckie Brothers and *Kynaston, Sutherland, & Co.* each became insolvent in 1866, and executed deeds of inspectorship.

At that time the balance of the account between the firms, excluding the bills, was about £700 in favour of *Luckie & Co.*

The *City Bank* was the holder of the bills of exchange accepted by *Kynaston, Sutherland, & Co.*, as above mentioned, to the amount of £7000, and filed the bill in this suit, on behalf of themselves and the other holders of the bills, against *Luckie, Kynaston,* and *Sutherland,* praying a declaration that the Plaintiffs and the other holders of the bills for £12,500 were entitled to the benefit of all the right and interests of *Kynaston* and his partner in the property comprised in the mortgage, so far as was necessary for the payment of all sums due or to become due upon the said bills.

The Vice-Chancellor *Stuart* dismissed the bill, and the Plaintiffs appealed (1).

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(1) 1869. Dec. 20.

SIR JOHN STUART, V.C.:—

I think it is impossible to bring this case within the equitable principle which would entitle the holders of these bills, that is, the Plaintiffs, to the benefit of the security in question. The case of *Ex parte Waring* (19 Ves. 345) certainly does not go that length; and in order to have any case in which you can make an equity in the holders of

Sir *Roundell Palmer*, Q.C., Mr. *Dickinson*, Q.C., and Mr. *Robinson*, for the Plaintiffs, cited *Ex parte Waring* (1) and *Trimingham* v. *Maud* (2).

Mr. *Morgan*, Q.C., and Mr. *Bagshawe*, for *Luckie*:—

In order to entitle the holder of bills to the benefit of securities held by the acceptor, as in *Ex parte Waring*, the security must be held to answer the bills; but it is not so here, and the security is merely to secure a cash credit. The mere transfer of a bill does not transfer the security: *Inman* v. *Clare* (3). Moreover, the

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the bills to have the security which is held by a person who enters into a transaction upon the bills, I think that security must, by contract, be connected with the transaction upon the bills. Lord *Eldon*, in *Ex parte Waring*, expressed his doubts upon the principle as a general equity. I confess the inclination of my own mind would rather be to support the general equity and carry it to its fullest extent. In all cases where a person is called upon to pay a debt for which he is not primarily liable, as, for instance, the acceptor of an accommodation bill of exchange, the doctrine which applies to the case of surety seems to me to apply. If a surety pays off the debt of the principal debtor he is entitled to the benefit of all securities. That is stated in a loose and general way, but I rather think the proper application of the doctrine is, that the surety who pays off the principal debt is entitled to the benefit of all securities held for that particular debt, and not of all the securities of a more general kind. That, I think, was the principle in *Wright* v. *Morley* (11 Ves. 12), which has been acted upon ever since. But, in this case, it seems to me impossible to connect a general mortgage for the cash balance that may be due from time to time, the rights of which have to be settled in arranging the account to which the mortgage relates—it is impossible to connect that with the particular bills of exchange which happen to be unpaid, and are paid by the person not primarily liable. Therefore, in my opinion, the equity of this case fails, and the bill must be dismissed with costs as a matter of course.

I think that *Powles* v. *Hargreaves* (3 D. M. & G. 430; 17 Jur. 612, 1083) is important in this point of view—that it extends the equity where the case occurs far beyond the case of bankruptcy or insolvency. It is an equity which does not seem to depend upon that at all, although a notion did prevail, after *Ex parte Waring*, that the principle applied rather only to bankruptcy, or to a double bankruptcy. That is not the law of this Court. I apprehend, where you can establish an equity of this kind, it is independent of any considerations which arise from the law of bankruptcy or insolvency, although no doubt the equity may be modified by what happens in bankruptcy and insolvency. The case of *Powles* v. *Hargreaves* seemed to be new in that respect, and the view which I took was supported by the Court of Appeal.

(1) 19 Ves. 345.

(2) Law Rep. 7 Eq. 201.

(3) Joh. 769; 5 Jur. (N.S.) 89.

equity claimed by the Plaintiff is purely an English doctrine, and will not prevail where the security is foreign. This security is not in the form of a mortgage, but is merely a right to a sale.

Mr. *Marten*, for *Kynaston & Sutherland.*

LORD HATHERLEY, L.C. :—

As regards the main question in this case, namely, whether the doctrine of *Ex parte Waring* (1) is applicable to this case, I cannot entertain any doubt. The case of *Ex parte Waring* stands upon a very plain and simple principle, which, when once understood, strikes every one as being the simple equity of the relations between parties to contracts of this description. If a person gives a security for the payment of any debt constituted, amongst other things, by bills upon which his creditor has made himself liable in order to advance money to the debtor, then, in the case of both parties becoming insolvent, the question arises which Lord *Eldon* solved in *Ex parte Waring*, namely, whether the estate of a person who, by becoming insolvent, was not able to pay the bills, could claim the benefit of the security, the bills remaining unpaid. The holders of the bills of course would say that they were in the position of the holder of the security, though not by virtue of any contract with him, because there was no contract in respect of the bills, for as long as both parties were solvent, he who gave the security, and he who received the security, might deal with the security just as they pleased, without any regard to who might be the bill-holders. But when there came to be a question whether the bills were to be paid or not, it was impossible for the estate, which claimed the value of the security, subject to the charge, to get back the security, unless all the duties that attached to it had been fulfilled. On the other hand, the other estate was not in a condition to make payment of the bills, and thus to come upon the security for indemnity. Therefore matters stood at a dead lock, and nothing could be done on one side or the other.

Lord *Eldon*, in *Ex parte Waring*, solved the difficulty by saying it was true that these were bills which were not paid, but,

(1) 19 Ves. 345.

inasmuch as the estate of the debtor could not be withdrawn until the bills were paid, and inasmuch as the estate of the creditor holding the security was in such a condition that he was not able to make payment of the bills in money's worth, the only way was to dispose of the security and pay the bills.

That is a very simple proposition; and, as Lord *Cranworth* has well pointed out in the case of *Powles* v. *Hargreaves* (1), the difficulty does not arise if either party is solvent. The bill-holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security cannot be taken away until all liability upon the bills is at an end.

It is said, however—and this seems to have been the view of the Vice-Chancellor in the Court below—that the security is only for the balance of a cash account. It seems to me utterly immaterial what is the form which the debt assumed, if, amongst other things, you find upon investigating the account that the creditor who claims the balance of the cash account has pledged his credit for the purpose of having that cash advanced, which he seeks to be paid. It is a cash advance in whatever way it be advanced, and in effect cash was advanced upon the security of *Kynaston, Sutherland, & Co.*; and *Kynaston, Sutherland, & Co.* being the persons who have thus made themselves liable, and taken this mode of advancing the money, cannot be called upon to part with the securities until they have been completely indemnified.

I do not think the law of *Demerara* has anything to do with it. The contract was made between English subjects with English rights, and what they contracted is this:—[His Lordship then commented on the terms of the instrument, and came to the conclusion that the money which was advanced in respect of bills, which *Kynaston, Sutherland, & Co.* had made themselves liable upon, was just as proper an advance on the account current as any other advance, and the result was that the securities could not be withdrawn until *Kynaston, Sutherland, & Co.* had been cleared.]

Minute:—Reverse the decree of the Vice-Chancellor. Declare that the property comprised in the security of the 25th of November, 1865 (subject to a prior mortgage) is a security for indemnifying *Kynaston, Sutherland, & Co.* against the payment of the bills of exchange, in the Plaintiff's bill mentioned, on which advances were made to *Luckie & Co.* by *Kynaston, Sutherland, & Co.* when such bills arrived at maturity; and that the Plaintiffs and the said other bill-holders are entitled to the benefit of such security, and to have the same applied in payment of the said bills, in order to indemnify *Kynaston, Sutherland, & Co.*, and are also entitled to participate therein rateably in proportion to the amounts due to them in respect of their respective bills. But this declaration is without prejudice to the right of the Plaintiffs and the other holders of the said bills to rank on the estates of the said *Luckie Brothers & Co.* and *Kynaston, Sutherland, & Co.* respectively, for the balance or residue of any of the said bills which may remain due to them after realising the said securities, and applying the proceeds thereof towards satisfaction of the amount due to them respectively in respect of their respective bills; and in case any of such bill-holders shall have proved on either of those estates, the amount of their respective proofs is to be reduced by the amounts which they may receive in respect of their proportions of the proceeds to arise from the said securities; and in case they have received any dividends in respect of the same part of their said debt, they are to repay or account for the same to the estates from which the same had been respectively received. Let the Chief Clerk inquire who are the holders of the said bills of exchange respectively, and certify what is due to the Plaintiffs and all other the said bill-holders for principal and interest in respect of their said bills; and let the Chief Clerk inquire what would have been due from the firm of *Luckie Brothers* to the firm of *Kynaston, Sutherland, & Co.* in the pleadings mentioned, had the bills for £12,500 been duly paid by the firm of *Kynaston, Sutherland, & Co.* at maturity. Let the Plaintiffs be at liberty to take such proceedings in *British Guiana*, or elsewhere, in the name of *Edward Kynaston*, or the names of his firm, as the Plaintiffs may be advised, for the purpose of raising the said charge, or realising the property comprised in the said securities, or for the purpose of making the same, and the rents or profits, available for the payment of the Plaintiff and the said bill-holders of the amount due to them respectively, to the extent of the declaration hereinbefore contained, and also the Plaintiff's costs of this suit, including the costs of this appeal, to be taxed in the usual manner.

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(1) 3 D. M. & G. 430. 17 Jur. 612, 1853.

Solicitors: Messrs. *Linklaters, Hackwood, & Addison*; Messrs. *Parker & Clarke.*

Ex parte MAURITZ. *In re* GILES.

L. J. J.
1870
July 30.

16 Ch D. 570
22 Ch D 799

Debtor-Summons—Secured Creditor—Bankruptcy Act, 1869, *ss*. 6, 7.

A debtor-summons by a secured creditor cannot be dismissed on the ground that he does not offer to give up his security or have it valued, though he must do so in order to obtain an adjudication in bankruptcy against the debtor.

THIS was a motion to discharge an order of Mr. Registrar *Brougham*, dismissing a debtor-summons.

In May, 1870, *Mauritz* sold to *Giles* a quantity of brandy for £277 10*s*., £100 to be paid at once and the remaining £177 10*s*. by bills at two and three months. *Giles* gave his cheque for the £100, but upon being presented it was dishonoured, he having no effects at the bank. *Mauritz*, on the 31st of May, took out a debtor-summons for £100. *Giles* applied to dismiss the summons, and filed an affidavit denying that he was indebted to *Mauritz* in the sum of £100. On the hearing of the application, he admitted, when examined, that he owed *Mauritz* the £100; but he relied on the ground that *Mauritz* was a secured creditor. The alleged security was that *Mauritz* had caused attachment at his suit out of the Lord Mayor's Court to be lodged against *Giles* at the *London Joint Stock Bank* and at the office of Messrs. *Barber & Sons*.

The Registrar was of opinion that *Mauritz* was a secured creditor, and dismissed the summons, being of opinion that he could not support it without filing an affidavit offering to give up his security or have it valued. *Mauritz* appealed.

Mr. *Reed*, for the Appellant:—

The Appellant is not a secured creditor. The attachment in no case amounts to a charge, and it is gone if there is an adjudication: *Wood* v. *Dunn* (1). But if it is a security, the not giving it up is no bar to a debtor-summons, though it is to a petition for adjudication: *Bankruptcy Act*, 1869, sects. 6, 7.

Mr. *Doria*, in support of the order:—

By sect. 7 a debt sufficient to support an adjudication in bank-

(1) Law Rep. 1 Q. B. 77; Ibid. 2 Q. B. 73.

12 Jur N.S. 38.

L. J. J.
1870
Ex parte
MAURITZ.
In re
GILES.

ruptcy is requisite to support a debtor-summons. The debt in each case is subject to the same conditions.

SIR W. M. JAMES, L.J. :—

I am surprised at the miscarriage which has taken place, for the terms of the Act are clear. It enacts that a creditor shall be entitled to a summons if his debt reaches a certain amount. The debt due to the Appellant exceeds that amount. The Act says that, when a secured creditor presents a petition for adjudication, he must state his willingness to give up his security or have it valued. But it does not say that the preliminary steps under a debtor-summons can only be taken on that condition.

Solicitors: Mr. *T. W. Buckler*; Mr. *Upfill.*

END OF VOL. V.

INDEX.

ABANDONED AGREEMENT — *Mortgagor — Redemption.*] Where a mortgagor had executed an agreement to deliver up possession of the mortgaged property, and to release all his interest to the mortgagee, and the agreement was not acted upon for twelve years, when the property was sold:—*Held*, that under the circumstances the mortgagor was entitled to the surplus of the purchase-money.—Decree of the Master of the Rolls affirmed. Rushbrook *v.* Lawrence 3

ABATEMENT IN PRICE—Husband and wife—Refusal of wife to convey - 534
See Sale by Husband and Wife.

ACCEPTANCE OF SHARES — *Company — Contributory—Conditional Allotment—Lapse of Time —Laches.*] *A.*, being desirous of lending money to a company, accepted 100 shares of £5 each, and paid £500, the whole amount of calls due thereon, upon condition that if he gave notice within a certain time his money should be repaid and the shares cancelled. He afterwards gave notice in pursuance of the agreement, and thereupon the money was repaid to him, and he executed a transfer of the shares to a nominee of the company, and his name was removed from the register of shareholders. Eight years afterwards the company was wound up:—*Held* (affirming the decision of the Master of the Rolls), that *A.* was a contributory. *In re* Patent Paper Manufacturing Company. Addison's Case. - 294

2. —— *Company—Contributory—Conditional Agreement to take Shares—Collateral Agreement.*] A person employed by a newly-established company as a local agent to induce persons to take shares, applied for shares in the company, on an understanding that he was to pay the calls out of the commission he received on shares disposed of by him, and was not to be otherwise liable for calls. His application was made for the avowed purpose of giving the company credit in his neighbourhood through his holding a considerable number of shares. He applied for shares by a letter in the usual form, accompanied by a letter referring to the conditions as to payment. Shares were allotted to him, and he was entered on the register: — *Held* (affirming the decision of *Malins*, V.C.), that this was not a case of a conditional contract to take shares, but of an absolute contract coupled with a collateral agreement, and that the applicant was a contributory. *In re* General Provident Assurance Company. Bridger's Case - - - - - 305

3. —— *Notice of Allotment not sent—Application through Agent.*] Shares were allotted to *L.* without his knowledge, on the application of *M.* Afterwards *L.*, at *M.'s* request, sent in a formal

ACCEPTANCE OF SHARES—*continued.*

application for the shares. No notice of allotment was sent to him. *M.* paid the deposit on the shares and received the share certificates, and also a dividend which was subsequently declared. *L.'s* name was on the register when the company was ordered to be wound up:—*Held* (affirming the decision of *Stuart*, V.C.), that *L.* had constituted *M.* his agent to accept the shares, and that he was properly placed on the list as a contributory of the company. *In re* International Contract Company. G. H. Levita's Case - - - - - - - 489

ACCOUNTS—Executor refusing to produce 573
See Executor's Accounts.

—— Liquidator's—Winding-up - - 437
See Liquidator's Accounts.

—— Partnership—Mode of taking - 687
See Partnership Accounts.

ACQUIESCENCE—Infant after attaining majority
See Infant Transferee. 2. 302

ACT OF BANKRUPTCY—Fraudulent conveyance
See Fraudulent Conveyance. 2. 577

ACTION AT LAW—Partition—Plaintiff out of possession - - - - 546
See Partition Suit. 3.

ADDING PLAINTIFF—Amendment - 548
See Amendment by adding Parties.

ADMINISTRATION — Foreign executor — Bona notabilia in *England* - - 314
See Foreign Executor.

ADMINISTRATOR — Suit against — Statute of Limitations - - - - 233
See Limitations, Statute of. 2.

AFFIDAVIT—Production of documents—Joint ownership - - - - 495
See Production of Documents. 1.

AGENT—Application for shares by - 489
See Acceptance of Shares. 3.

—— Army agent—Policy of assurance - 32
See Policy effected by Creditor. 1.

—— Company—Proof for commission - 737
See Prospective Commission.

—— Solicitor — Authority to pledge client's credit - - - - 457
See Counsel's Fees.

AGREEMENT — Abandonment of — Release of equity of redemption - - 3
See Abandoned Agreement.

—— Arbitration - - - 519, 648
See Enforcing Agreement for Arbitration. 1, 2.

AGREEMENT FOR SEPARATION—*Husband and Wife — Specific Performance.*] An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, decreed to be specifically performed —Decree of *Stuart*, V.C., affirmed. Gibbs *v.* Harding - - - - - 336

ALLOTMENT OF SHARES—Conditional 294, 305

See Acceptance of Shares. 1, 2.

—— Notice not sent - - - 489

See Acceptance of Shares. 3.

—— Paid-up shares - - - 11, 270, 346

See Subscriber of Memorandum. 1, 3, 4.

ALLOWANCE TO NEXT OF KIN OF LUNATIC.] Weekly allowances ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. *In re* Frost - - - 699

ALTERATION OF WINDOWS - - 163

See Light and Air.

AMALGAMATION OF COMPANIES — Appointment of official liquidator - 396

See Official Liquidator. 1.

—— Insurance company—Transfer of business [118, 381, 632, 640

See Novation of Contract. 1—4.

AMENDMENT—Bill—Adding Plaintiff - 548

See Amendment by adding Parties.

—— Bill of costs, after delivery - - 694

See Taxation of Costs. 2.

AMENDMENT BY ADDING PARTIES—*Practice—Adding Plaintiff.*] A bill was filed against the lord of a manor by a Plaintiff, on behalf of himself and all the other freehold and copyhold tenants of the manor, the Plaintiff being at the time aware that there were enfranchised copyholders of the manor who might have similar rights against the lord:—*Held*, that the Plaintiff could not obtain leave to amend by adding as co-Plaintiff one of the enfranchised copyholders.—Order of the Master of the Rolls discharged. Peek *v.* Spencer - - - - 548

ANCIENT LIGHTS - - - - 163

See Light and Air.

ANNUITY—Charged on *corpus* - - 684

See Annuity charged on Corpus.

—— Redeemable — Life assurance — Right to policy - - - - 515

See Policy effected by Creditor. 2.

ANNUITY CHARGED ON CORPUS—*Income or corpus.*] A testator gave his real and personal estate to trustees, in trust to pay his debts and legacies, and then, out of the annual profits of the residue, to pay three life-annuities, and, "subject as aforesaid," to stand possessed of the residue, upon trust to apply the income for the benefit of *G. B.* for life, and after his death the testator gave the residue to *P. B.* The income of the residue proved insufficient to pay the three annuities in full, and the trustees paid them rateably till November, 1868, when one of the annuitants died with an arrear owing to him; the tenant for life being still living:—*Held* (affirming the order of *Stuart*, V.C., with a variation), that the annuities were a continuing charge on the rents and profits, and that the rents and profits since November, 1868, must be applied first in payment of the arrears of the three annuities *pari passu*, and then in payment of the two subsisting annuities. Booth *v.* Coulton - - 684

ANNULLING REGISTRATION—*Creditors' Deed—Bankruptcy Act*, 1861, *s.* 192.] The Court has jurisdiction to order the registration of a deed of arrangement with creditors under sect. 192 of the *Bankruptcy Act*, 1861, to be cancelled.—Where a creditors' deed has been registered under the *Bankruptcy Act*, 1861, sect. 192, without having been assented to as required by the Act, the Court will not necessarily order the registration to be cancelled; but it will do so where the deed is fraudulent, and one to which the assenting creditors must be supposed to have assented on the assumption that it would not be registered unless the requisite amount of assents were obtained. *Ex parte* Greaves. *In re* Greaves. [326

ANSWER—Insufficiency—Executor's accounts

See Executor's Accounts. [573

APPEAL—Discretion of Judge - 597, 644

See Official Liquidator. 2, 3.

—— Hearing—Course of proceeding - 546

See Partition Suit. 3.

—— Married woman without next friend - 274

See Next Friend.

—— Order in Chambers - - - 88

See Interest in Winding-up. 2.

—— Receiver—Choice of—Winding-up - 420

See Receiver.

—— Staying proceedings - - 453, 720

See Staying Proceedings. 1, 2.

—— Withdrawal of—Costs - - - 116

See Withdrawal of Appeal.

APPLICATION TO PARLIAMENT—Injunction to restrain - - - - 671

See Restraining Application to Parliament.

APPOINTMENT—Official liquidator 396, 597, 644

See Official Liquidator. 1—3.

APPOINTMENT BY GENERAL BEQUEST—*Power—General Bequest—Default of Appointment.*] A testator gave his residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children:—*Held*, that the testator's children took their respective shares for their lives, and had power to appoint to their respective children, if any.—One of the daughters, by her will, after expressing her intention to appoint her share to her children, gave a part only to her children, and, after directing her debts and legacies to be paid, gave to one of her children the residue of the personal estate which belonged to her, or which she had power to dispose of:—*Held*, that the unappointed

APPOINTMENT BY GENERAL BEQUEST—*contd.* part of the share was not appointed by the residuary bequest, and was divisible amongst the children equally. Butler *v.* Gray - 26

APPROPRIATION OF PAYMENTS - - 659
See Securities for Bills of Exchange. 1.

ARBITRATION—Enforcing agreement for [519, 648
See Enforcing Agreement for Arbitration. 1, 2.

ASSETS—Power of executor to pledge - 663
See Power to pledge Assets.

ASSIGNMENT—Contract for purchase—Notice
See Sub-Contract. [604
—— Debt of bankrupt shareholder—Proof in winding-up - - - - 492
See Set-off in Winding-up.

BALANCE ORDER—Bankrupt shareholder 492
See Set-off in Winding-up.

BANKRUPT SHAREHOLDER — *Inspectorship Deed—Winding-up—Calls—Proof under Deed—Order on Debtors.*] Two shareholders in a company ordered to be wound up voluntarily executed as debtors a deed of inspectorship, to which the debtors, the inspectors, and all creditors who would have been entitled to prove against the debtors under an adjudication of bankruptcy, were expressed to be parties. The deed contained no actual assignment of the estate of the debtors, but contained provisions for converting their estate into money, and applying it in payment of the debts due to the creditors, and also contained provisions for a release being given to them in certain events. The deed was duly registered in bankruptcy:—*Held* (reversing the decision of *Stuart*, V.C.), that the Court of Chancery ought not to make an order in the winding-up upon the debtors for payment of calls, though the calls were made since the deed was executed, but that the calls were debts proveable under the deed of inspectorship. *In re* Bank of Hindustan, China, and Japan. Mitchell's Case - - - - 400

BANKRUPTCY—Act of—Fraudulent conveyance
See Fraudulent Conveyance. 2. [577
—— Appeal - - - 470, 473, 482
See Bankruptcy Appeal. 1—3.
—— Debt without expectation of payment 13
See Debt without Expectation of Payment.
—— Debtor summons—Security—Staying proceedings - - - - 741
See Debtor Summons. 1.
—— Debtor summons—Secured creditor - 779
See Debtor Summons. 2.
—— *Ex parte* order - - - - 16
See Ex parte Order.
—— Examination of witness—Professional privilege - - - - - 703
See Privileged Communication.
—— Injunction—Dealing with assets - 473
See Injunction in Bankruptcy.
—— Jurisdiction—Trusts of creditors' deed [219, 746
See Trusts of Creditors' Deed. 1, 2.

BANKRUPTCY—*continued.*
—— Liquidation by arrangement — Voting of creditors - - - - 722
See Majority of Creditors.
—— Petitioning creditor's debt - - 176
See Petitioning Creditor
—— Petitioning creditor's debt - - 486
See Second Adjudication.
—— Privilege of Parliament - - 172
See Privilege of Parliament.
—— Second adjudication to impeach first 486
See Second Adjudication.
—— Staying proceedings—Debtor summons 743
See Staying Proceedings in Bankruptcy.
—— Taxation of costs—Power of Registrar 482
See Taxation of Costs. 1.
—— Transfer by Chief Judge - - 486
See Second Adjudication.
—— Voting of creditors—Signature - 722
See Majority of Creditors.

BANKRUPTCY APPEAL—*Pending Proceedings—Appeal from Judge of County Court—Bankruptcy Act*, 1869, *ss.* 71, 130—*Bankruptcy Repeal Act*, 1869, *s.* 20—*Rules in Bankruptcy*, 1870, *Rules* 143, 319.] Where pending proceedings in a District Court in Bankruptcy have been transferred by the Lord Chancellor to a County Court under sect. 130 of the *Bankruptcy Act*, 1869, an appeal from a decision of the County Court Judge, under the powers of the Act of 1861, lies to the Court of Appeal in Chancery, not to the Chief Judge in Bankruptcy. *Ex parte* Palmer. *In re* Palmer [470

2. —— *Pending Proceedings—County Court—Bankruptcy Act*, 1869, *ss.* 71, 72.] Where pending proceedings in a District Court of Bankruptcy have been transferred by the Lord Chancellor to a County Court under sect. 130 of the *Bankruptcy Act*, 1869, an appeal from a decision of the County Court Judge under the powers of the Act of 1869 lies, in the first instance, to the Chief Judge in Bankruptcy, not to the Court of Appeal in Chancery.—*Ex parte Palmer* (*ante*, p. 470) distinguished. *Ex parte* Anderson. *In re* Anderson [473

3. —— *Bankruptcy—Practice—Pending Proceedings—Appeal from Registrar—Bankruptcy Act*, 1869, *ss.* 71, 130—*Rules in Bankruptcy*, 1870, *Rule* 143.] Where a Registrar is acting in a matter pending in a district Court under an order of the Lord Chancellor made in pursuance of the 130th section of the *Bankruptcy Act*, 1869, an appeal from his decisions lies to the Court of Appeal in Chancery. *Ex parte* Blair. *In re* Mackle - - - - - 482

BENEFIT BUILDING SOCIETY - 4, 309
See Building Society. 1, 2.

BENEFIT OF SURVIVORSHIP - - 244
See Death coupled with Contingency.

BILL OF EXCHANGE — Company — Acceptance before winding-up order - - 567
See Dispositions before Winding-up Order.
—— Overdue—Equities affecting holder - 358
See Overdue Bill of Exchange.
—— Petitioning creditor — Debt — Indorsement after act of bankruptcy - - 176
See Petitioning Creditor.

BILL OF EXCHANGE—*continued.*
—— Securities for - - - 659, 773
See Securities for Bills of Exchange. 1, 2.

BILL OF REVIEW—Leave to file—Mistake of witness - - - - - 763
See Misconduct of Directors.

BONA NOTABILIA—Foreign creditor - 314
See Foreign Executor.

BOND—Security on debtor summons - 741
See Debtor Summons. 1.

BORROWING POWERS—Benefit building society
See Building Society. 1, 2. [4, 309

BROKER—Company—Dealing in shares—Right of proof - - - - - 444
See Unauthorized Dealing in Shares.

BUILDING SOCIETY—*Building Societies Act* (6 & 7 *Will.* 4, *c.* 32)—*Legality of Rule—Power to borrow.*] A rule empowering the trustees of a building society to borrow a limited amount of money for the purposes of the society is not illegal under the *Building Societies Act.*—The certificate of the Barrister appointed to certify rules under the *Building Societies Act* is not conclusive as to the legality of a rule. Laing *v.* Reed - 4

2. —— *Power to borrow—Ultrà vires Act—Winding-up Petition—Petitioning Creditor's Debt.*] A benefit building society has no power to borrow money unless its rules specially authorize it to do so.—The directors of a benefit building society, the rules of which gave no power to borrow money, borrowed a sum of money for the purpose of advancing it to their members on the security of their shares. The lender of the money afterwards presented a Petition for an order to wind up the company:—*Held* (reversing the decision of the Master of the Rolls), that the transaction was *ultrà vires*, and that the Petitioner had no legal or equitable debt against the company, and the Petition was accordingly dismissed.—*In re German Mining Company* (4 D. M. & G. 19) distinguished. *In re* National Permanent Benefit Building Society. *Ex parte* Williamson [309

CAPITAL—Reduction of—Companies Act, 1867 [407
See Reduction of Capital and Shares.

CAPITAL AND REVENUE—Company - 621
See Restraining ultrà vires Act.

CASES—*Baldwin* v. *Rogers* (3 D. M. & G. 649) distinguished - - - 713
See Gift, Original or Substitutional. 2.

—— *Benham's Trust, In re* (Law Rep. 4 Eq. 416) overruled - - - - 139
See Presumption of Death.

—— *Bennett's Trusts, Re* (3 K. & J. 280) distinguished - - - - - 713
See Gift, Original or Substitutional. 2.

—— *Bissell* v. *Jones* (Law Rep. 4 Q. B. 49) followed - - - - - 332
See Unreasonableness of Creditors' Deed.

—— *Bowen* v. *Brecon Railway Company* (Law Rep. 3 Eq. 541) questioned - 67
See Scheme of Arrangement.

—— *Castello's Case* (Law Rep. 8 Eq. 504) approved of - - - - - 293
See Infant Transferee. 1.

CASES—*continued.*
—— *Drummond's Case* (Law Rep. 4 Ch. 772) distinguished - - - - 270
See Subscriber to Memorandum. 3.

—— *Foxwell* v. *Bostock* (12 W. R. 723) considered.
See Infringement of Patent. [36

—— *Gardner* v. *London, Chatham, and Dover Railway Company* (Law Rep. 2 Ch. 201) distinguished - - - 318
See Debenture.

—— *German Mining Company, In re* (4 D. M. & G. 19) distinguished - - 309
See Building Society. 2.

—— *Heath* v. *Bucknall* (Law Rep. 8 Eq. 1) observed upon - - - - 163
See Light and Air.

—— *Hindmarsh, In re* (1 Dr. & Sm. 129) commented on - - - - 233
See Limitations, Statute of. 2.

—— *Kellock's Case* (Law Rep. 3 Ch. 769) explained - - - - 18, 167
See Creditor holding Security. 1, 2.

—— *Kelly* v. *Morris* (Law Rep. 1 Eq. 697) explained - - - - 279
See Copyright in Directory.

—— *Lister* v. *Leather* (8 E. & B. 1004) considered.
See Infringement of Patent.

—— *Martin* v. *Powning* (Law Rep. 4 Ch. 356) approved of - - - 219
See Trusts of Creditors' Deed. 1.

—— *Morris* v. *Ashbee* (Law Rep. 7 Eq. 34) explained - - - - 279
See Copyright in Directory.

—— *Palmer, Ex parte* (Law Rep. 5 Ch. 470) distinguished - - - 473
See Bankruptcy Appeal. 2.

—— *Pell's Case* (Law Rep. 5 Ch. 11) distinguished - - - - 270
See Subscriber of Memorandum. 3.

—— *Shrewsbury, Earl of,* v. *Trappes* (2 D. F. & J. 172) considered - - - 453
See Staying Proceedings. 1.

—— *Snell's Case* (Law Rep. 5 Ch. 22) distinguished - - - - 707
See Subscriber of Memorandum. 5.

—— *Spirett* v. *Willows* (3 D. J. & S. 293) considered - - - - 538
See Fraudulent Conveyance. 1.

—— *Tapling* v. *Jones* (11 H. L. C. 290) considered - - - - 163
See Light and Air.

—— *Thomas* v. *Thomas* (2 Dr. & Sm. 298) overruled - - - - 139
See Presumption of Death.

—— *Topham* v. *Duke of Portland* (1 D. J. & S. 603) considered - - - 453
See Staying Proceedings. 1.

—— *Vogel, Ex parte* (2 B. & A. 219) - 703
See Privileged Communication.

—— *Walford* v. *Walford* (Law Rep. 3 Ch. 812) considered - - - - 453
See Staying Proceedings. 1.

—— *Waring, Ex parte* (19 Ves. 345) considered 773
See Securities for Bills of Exchange. 2.

—— *Warrant Finance Company's Case* (4 Ch. 647) - - - - 122
See Interest in Winding-up. 3.

CHARGE—Annuity on *corpus* - - 684
See Annuity charged on Corpus.
—— Debenture—Undertaking of company 318
See Debenture.
CHARITY—Gift to, not exhausting income 503
See Charity not exhausting the whole Income.
—— Uncertainty - - - - 570
See Uncertain Gift.

CHARITY NOT EXHAUSTING THE WHOLE INCOME—*Devise*—*Surplus.*] A testator devised certain houses and tenements to the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers* "for this intent and purpose, and upon this condition," that they should yearly distribute £8 after the manner following: that is to say, sums amounting to £7 15*s.* to charities; and the other 5*s.* to the Master and Wardens for the time being equally; and the rest of the profits he willed should be bestowed upon the reparations of the houses and tenements; and if the Master, Wardens, and Commonalty should leave any of these things undone, then he willed that his next of kin should enter into the tenements, and hold unto him and his heirs for ever, upon condition that he and they and every of them do all these things. At or shortly before the date of the devise the annual income of the property was £9 4*s.*; but it subsequently became much greater:—*Held* (affirming the decision of the Master of the Rolls), that the Master, Wardens, and Commonalty were entitled to the whole surplus, after payment of £7 15*s.* yearly, for their own benefit. Attorney-General *v.* Wax Chandlers' Company - 503

CLAIM—Winding-up—Form of putting in 18
See Creditor holding Security. 1.
CLASS—Original or substituted gift - 342, 713
See Gift, Original or Substitutional. 1, 2.
COLLUSIVE FORFEITURE - - - 79
See Forfeiture of Shares. 2.
COLOURABLE VARIATION—Name of firm 155
See Right to Name of Firm.
COMMISSION—Proof for, in winding-up - 737
See Prospective Commission.
COMPANY—Acceptance of shares—Agent 489
See Acceptance of Shares. 3.
—— Acceptance of shares—Conditional acceptance - - - - 294, 305
See Acceptance of Shares. 1, 2.
—— Amalgamation—Transfer of business—Life insurance - 118, 381, 632, 640
See Novation of Contract. 1–4.
—— Bankrupt shareholder — Proof for calls against - - - - 400
See Bankrupt Shareholder.
—— Debenture—Charge on undertaking 318
See Debenture.
—— Deceased shareholder—Liability of executors
See Deceased Shareholder. [725
—— Directors—Misconduct - - 763
See Misconduct of Directors.
—— Directors—Persons assuming to be - 288
See Directors de facto.
—— Disposition of property before winding-up order - - - - - 567
See Dispositions before Winding-up Order.

COMPANY—*continued.*
—— Foreign business—Registered in *England*
See Winding-up Petition. 1. [363
—— Forfeiture of shares - - - 63, 79
See Forfeiture of Shares. 1, 2.
—— Infant transferee - - 298, 302, 614
See Infant Transferee. 1—3.
—— Irish—Winding-up - - - 93
See Irish Winding-up.
—— Life insurance—transfer of business - 118, 381, 632, 640
See Novation of Contract. 1—4.
—— Official liquidator—Appointment of - 396,
See Official Liquidator. 1–3. [597, 644
—— Past members—Class B. - - 428
See Past Members.
—— Power to buy up shares - - 444
See Unauthorized dealing in Shares.
—— Reduction of capital and shares - 407
See Reduction of Capital and Shares.
—— Scheme of arrangement - - 67
See Scheme of Arrangement.
—— Set-off—Bankrupt shareholder - 492
See Set-off in Winding-up.
—— Shares transferable by delivery - 369
See Winding-up Petition. 1.
—— Subscriber of memorandum 11, 22, 270, 346, [707
See Subscriber of Memorandum. 1—5.
—— Transfer of shares - - - 559
See Transfer of Shares.
—— *Ultrà vires Act*—*Locus standi* of Plaintiff [621
See Restraining Ultrà Vires Act.
—— Unregistered—Winding-up - - 118
See Novation of Contract. 1.
—— Winding-up—Proof—Bankrupt shareholder
See Bankrupt Shareholder. [400
—— Winding-up—Proof by secured creditor 18, [167
See Creditor holding Security. 1, 2.

CONCURRENT SUITS — *Practice* — *Transfer of Cause.*] Where a person, knowing that a suit has been instituted in one branch of the Court, files a bill in another branch of the Court in respect of the same subject-matter, the second cause will be ordered to be transferred to the Court to which the first cause is attached, and the Plaintiff in the second cause will, as a general rule, be ordered to pay the costs of the application for such transfer. Orrell *v.* Busch - 467

CONSOLIDATION ORDER—xxix. r. 6 - 323
See Process to enforce Order.
CONTRACT—Novation of - 118, 381, 632, 640
See Novation of Contract. 1—4.
CONTRIBUTORY—Acceptance of shares—Agent
See Acceptance of Shares. 3. [489
—— Acceptance of shares—Conditional 294, 305
See Acceptance of Shares. 1, 2.
—— Deceased shareholder — Liability of executors - - - - - - 725
See Deceased Shareholder.
—— Forfeiture of shares - - 63, 79
See Forfeiture of Shares. 1, 2.
—— Infant transferee - 298, 302, 614
See Infant Transferee. 1, 2, 3.

CONTRIBUTORY—*continued.*

—— Irish winding-up - - - 93
See Irish Winding-up.

—— Past members — Contribution, how to be divided - - - - 428
See Past Members.

—— Set-off—Bankrupt shareholder - 492
See Set-off in Winding-up.

—— Subscriber of memorandum - 11, 22, 270, [346, 707
See Subscriber of Memorandum. 1—5.

—— Transfer to escape liability - - 559
See Transfer of Shares.

COPYHOLDS—Bill on behalf of—Copyholders adding co-Plaintiffs - - - 548
See Amendment by adding Parties.

—— Customary heir of unsound mind - 72
See Trustee Act, 1850.

—— Seizure *quousque* - - - 531
See Limitations, Statute of. 2.

COPYRIGHT—Directory - - - 279
See Copyright in Directory.

—— Old writers - - - - 251
See Copyright in Old Authorities.

COPYRIGHT IN DIRECTORY—*Use of Slips in compiling New Directory, where justifiable—Interlocutory Injunction.*] Although the compiler of a new directory is not justified in using slips cut from one previously published, for the purpose of deriving information from them for his own work, yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained. The Plaintiff, who was the publisher of a trades directory, filed a bill against the Defendant, who was preparing for publication a new directory, charging him with using slips cut from the Plaintiff's work in obtaining materials for the new directory, and with copying from such slips. The Plaintiff having moved for an interlocutory injunction, the Defendant filed an affidavit, in which he admitted that at first he had used slips from the Plaintiff's work in obtaining materials for his own; but having discovered that it was illegal to do so, he had discontinued the practice; and he denied having copied any of such slips. In the absence of satisfactory evidence of the actual contents of the new directory, which was not yet published, the Court refused the injunction.—Decision of *James*, V.C., affirmed.—*Kelly* v. *Morris* (Law Rep. 1 Eq. 697) and *Morris* v. *Ashbee* (Law Rep. 7 Eq. 34) explained. Morris *v.* Wright - 279

COPYRIGHT IN OLD AUTHORITIES—*Copyright—Older Writers—Theory.*] The Plaintiff published a book, and the Defendant afterwards published a book on the same subject, in which he mentioned the Plaintiff's book as one of the authorities consulted by him. The Plaintiff alleged that the Defendant's book was a piracy, and in proof shewed (amongst other things) that the Plaintiff had referred to a large number of authorities to which the Defendant had referred. The Defendant stated that he had taken the references from a previous writer from whom the Plaintiff had taken them, and shewed that he, the Defendant, had referred to two authorities not mentioned by the Plaintiff; but as to two of the authorities referred to by the Plaintiff, and also by the Defendant, the Defendant was unable to state where he had found them:—*Held*, that, under the circumstances, the Defendant had not made such use of the Plaintiff's book as to entitle the Plaintiff to an injunction.—An author who has been led by a former author to refer to older writers, may, without committing piracy, use the same passages in the older writers which were used by the former author.—An author has no monopoly in any theory propounded by him.—Decree of *James*, V.C., reversed. Pike *v.* Nicholas - - - 251

CORPORATION—Renewable leaseholds - 214
See Renewable Leaseholds.

CORPUS OR INCOME—Charge of annuity - 684
See Annuity charged on Corpus.

CORRUPT BARGAIN—Appointment - 203
See Fraudulent Appointment. 2.

COSTS—Bill of—Amendment after delivery 694
See Taxation of Costs.

—— Creditors' representatives - - 424
See Priority of Policies.

—— Patent—Reference to law officer - 518
See Sealing of Patent. 2.

—— Staying proceedings - - - 453
See Staying Proceedings. 1.

—— Taxation of - - - 482, 694
See Taxation of Costs. 1, 2.

—— Trustee Relief Act - - - 170
See Trustee Relief Act.

—— Withdrawal of appeal - - - 116
See Withdrawal of Appeal.

COUNSEL'S FEES—*Authority of Solicitor to pledge his Client's Credit.*] A solicitor has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them. Mostyn *v.* Mostyn - - - - 457

COUNTY COURT—Bankruptcy—Appeal 470, 473
See Bankruptcy Appeal. 1, 2.

COVENANT—To settle by will - - 182
See Will in pursuance of Marriage Articles.

—— To settle—Non-investment of funds—Statute of Limitations - - - 74
See Limitations, Statute of. 1.

—— To surrender copyholds—Trustee Act 72
See Trustee Act, 1850. 1.

CREDITOR — Effecting policy — Redemption — Right to policy - - 32, 515
See Policy effected by Creditor. 1, 2.

—— Restraining *ultrà vires* act of—Company—*Locus standi* - - - 621
See Restraining ultrà vires Act.

—— Secured—Debtor summons—Valuation 779
See Debtor Summons. 2.

—— Secured—Proof under winding-up 18, 167
See Creditor holding Security. 1, 2.

—— Secured—Winding-up—Interest on debt [86, 88
See Interest in Winding-up. 1, 2.

CREDITOR HOLDING SECURITY — *Company—Sending in Claim — Gen. Ord.* 11 *Nov.*, 1862, *Rule* 20.] A banking company, in consideration of *F.* accepting bills of exchange against

CREDITOR HOLDING SECURITY—*continued.*
a ship and her freight, agreed by letter of guarantee to provide him with funds to meet the acceptances, which were secured by a mortgage by *B.* Before the bills became due the company was ordered to be wound up. When they became due, a notary took the guarantee to the bank, and requested payment, which the official liquidator refused. No further claim was made until after the security had been realised by *F.*:—*Held* (affirming the decision of the Master of the Rolls), that the presentment of the guarantee by the notary was not putting in a claim within the meaning of the rule in *Kellock's Case* (Law Rep. 3 Ch. 769), and that *F.* could prove only for the balance which remained due after he had received the proceeds of the securities.—*Kellock's Case* explained.—*In re* BARNED'S BANKING COMPANY. FORWOOD'S CLAIM - - - - 18

2. —— *Winding-up—Letter of Credit.*] *C.* being instructed to purchase cotton for *D.*, the *B.* company, at *D.'s* request, gave *C.* a letter of credit authorizing him to draw upon them to a certain amount, the bills to be accompanied by bills of lading for cotton, to be delivered up to the company on their accepting the bills. Bills were accordingly drawn, and were accepted by the company; but before they came to maturity the company stopped payment, and was afterwards ordered to be wound up. *C.* sent in a claim under the winding-up, and afterwards received the proceeds of the sale of the cotton:—*Held*, that *Kellock's Case* (Law Rep. 3 Ch. 769) did not apply, for that under the terms of the letter of credit the bills of lading were to be a security to the company, and that *C.* could only stand as a creditor for the balance. *In re* BARNED'S BANKING COMPANY. COUPLAND'S CLAIM - - 167

—— Mortgagee who has contracted to sell 433
See PROOF BY MORTGAGEE.

CREDITORS—Resolution for liquidation by arrangement—Voting - - 722
See MAJORITY OF CREDITORS.

CREDITORS' DEED—Annulling registration 326
See ANNULLING REGISTRATION.

—— Assents—Proof of - - - 746
See TRUSTS OF CREDITORS' DEED. 2.

—— Enforcing trusts—Jurisdiction of Chancery [219, 746
See TRUSTS OF CREDITORS' DEED. 1, 2.

—— Proof for calls under winding-up - 400
See BANKRUPT SHAREHOLDER.

—— Unreasonableness - - - 332
See UNREASONABLENESS OF CREDITORS' DEED.

CREDITORS' REPRESENTATIVE—Costs - 424
See PRIORITY OF POLICIES.

DAMAGES—Tort—Debt without expectation of payment - - - - 13
See DEBT WITHOUT EXPECTATION OF PAYMENT.

DEATH—Gift on, coupled with words of contingency - - - - 244
See DEATH COUPLED WITH CONTINGENCY.

—— Presumption of, after seven years - 139
See PRESUMPTION OF DEATH.

DEATH COUPLED WITH CONTINGENCY—*Will—Construction—Period of Contingency—Survivorship.*] Immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship" in case any of them should die without issue; and in case any of them should die leaving children, then the share, whether original or accruing, of each so dying to go to such children:—*Held* (reversing the decision of *Malins*, V.C.), that the clause of survivorship, and the limitation over to children of the legatees, were not confined to the lifetime of the testator, and intended merely to guard against lapse; and that the residuary legatees did not upon surviving the testator at once acquire absolute indefeasible interests in their shares. BOWERS *v.* BOWERS. 244

DEBENTURE—*Charge on "the Undertaking"—Property of the Company—Winding-up.*] A steamship company, having power to issue mortgages, bonds, or debentures, issued mortgage debentures, charging the "undertaking, and all sums of money arising therefrom," with the repayment at a specified time of the money borrowed, with interest in the meantime. Before the debentures became due the company was wound up, and the ships and other property of the company were sold:—*Held* (affirming the decision of *Malins*, V.C.), that the debenture holders acquired a charge upon all the property of the company, past and future, by the term "undertaking;" and that they were entitled to be paid out of the property of the company in priority to the general creditors:—*Semble*, that, even if the company had not stopped, the debenture holders might have filed a bill to realize their security.—*Gardner* v. *London, Chatham, and Dover Railway Company* (Law Rep. 2 Ch. 201), distinguished. *In re* PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL COMPANY - 318

—— Holder of—Execution - - - 67
See SCHEME OF ARRANGEMENT.

DEBT—"Contracted"—Damages in tort—Bankruptcy - - - - 13
See DEBT WITHOUT EXPECTATION OF PAYMENT.

—— Novation of - - 118, 381, 632, 640
See NOVATION OF CONTRACT. 1—4.

DEBT WITHOUT EXPECTATION OF PAYMENT—*Bankruptcy Act*, 1861, *s.* 159—*Damages in tort.*] After an order *nisi* had been made in a divorce suit, dissolving the marriage, and ordering the co-Respondent to pay damages and costs, the co-Respondent made away with his property, and when the order became absolute he was utterly without means to pay them, and immediately afterwards was made bankrupt on his own application. He owed only one other debt of trifling amount for money borrowed some years before:—*Held*, that the damages and costs were not a debt "contracted" by him within the meaning of the *Bankruptcy Act*, 1861, s. 159, and that he could not be dealt with as having contracted any of his debts without reasonable expectation of being able to pay them. *Ex parte* CLAYTON. *In re* CLAYTON - - - - - 13

DEBTOR SUMMONS—*Bankruptcy Act*, 1869, *s.* 9—*Gen. Ord. in Bankruptcy, Jan.* 1, 1870, *Rules* 158, 162.] An order was made on a debtor summons, that the debtor within seven days should

DEBTOR SUMMONS—*continued.*
give a bond, with sureties, to pay such sums as should be recovered by the creditors; and it was further ordered that all proceedings on the summons should be stayed, until the Court in which proceedings should be taken for the debt should have come to a decision. The Registrar never gave any notice of the time and place when and where the bond was to be executed. The sureties first proposed having been objected to, the seven days passed without the bond having been executed. The creditors then applied for an adjudication in bankruptcy, which was made:—*Held*, that as the order made on the summons stayed all proceedings under the summons unconditionally, the adjudication could not be maintained.—Whether the objection arising from the default of the Registrar in not fixing a time and place for the execution of the bond might not have been surmounted, *quære*. *Ex parte* Johnson. *In re* Johnson. - - - 741

2. —— *Secured Creditor — Bankruptcy Act*, 1869, *ss.* 6, 7.] A debtor summons by a secured creditor cannot be dismissed on the ground that he does not offer to give up his security or have it valued, though he must do so in order to obtain an adjudication in bankruptcy against the debtor. *Ex parte* Mauritz. *In re* Giles - - 779

—— Staying proceedings on petition for creditors [743
See Staying Proceedings in Bankruptcy.

DECEASED SHAREHOLDER—*Company—Extent of Liability of his Executors.*] In a joint stock company the presumption is, that the executors of a deceased shareholder succeed to the full liability, as well as to the rights of their testator. The deed of settlement is to be looked at, not to see whether it imposes such liability on the executors, but whether it takes it away or limits it.—The fact that by the deed of settlement executors are not entitled to the full privileges of shareholders until they or their nominees have been registered as shareholders, is no proof of an intention to limit their liability in their representative character.—Accordingly, in the case of a joint stock company formed in 1845, where, in the opinion of the Court, nothing appeared in the deed of settlement to limit the liability of the executors of a deceased shareholder, it was held (reversing the decision of the Master of the Rolls) that their liability was not limited to debts incurred before the death of the testator. *In re* Agriculturist Cattle Insurance Company. Baird's Case 725

DEFEATING AND DELAYING CREDITORS - 538,
See Fraudulent Conveyance. 1, 2. [577

DEVISE WITHOUT WORDS OF LIMITATION—*Will—Construction—Fee simple implied from Gift over—Substitution.*] A testator, by his will, made in 1806, devised all his real estate to his two brothers during their joint lives and the life of the survivor; and, after the death of the survivor, unto and equally amongst all the children of his said brothers who should be then living; and in case of the death of any of the said children in the lifetime of his said brothers or the survivor of hem, leaving lawful issue, then he devised the part or share of such deceased parent or parents unto and equally amongst all his, her, or their children who should be then living; and he devised the residue of his real and personal estate to his widow, her heirs, executors, administrators, and assigns:—*Held* (affirming the decision of *Malins*, V.C.), that the children and grandchildren of the testator's brothers took estates in fee simple in their respective shares.—In construing a will made before the *Wills Act*, the rule that an indefinite devise may be enlarged into a fee simple by a gift over in a particular event is not confined to a devise of a vested interest, but is equally applicable to a contingent devise. *In re* Harrison's Estate - - - - - 408

DIRECTORS—De facto—Insurance company 288
See Directors de facto.

—— Liability of—Presence at meeting—Dealing in shares - - - - 763
See Misconduct of Directors.

—— Power to buy up shares - - 444
See Unauthorized dealing in Shares.

—— Power to compromise disputes. - 79
See Forfeiture of Shares. 2.

—— Power to make calls—Fraudulent use of
See Transfer of Shares. [559

—— Transfer to escape liability - - 559
See Transfer of Shares.

DIRECTORS DE FACTO—*Policy of Assurance—Persons falsely assuming to carry on Company—Notice.*] A person who effects a policy with a life assurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the Acts of Parliament under which it is incorporated.—A life assurance company was registered in 1863. By the articles of association *P.* was appointed managing director. The directors who were named in the articles, and signed the memorandum of association, refused to act, and passed a resolution that the company should not carry on business or allot shares. Notwithstanding this resolution, *P.* and one of the shareholders persisted in carrying on the business at the registered office of the company, and allotted shares and appointed directors. A stranger effected a policy at the company's office, which was signed by three of the *de facto* directors, and sealed with what purported to be the company's seal:—*Held* (affirming the decision of the Master of the Rolls), that the policy was binding on the company. *In re* County Life Assurance Company - - - - - - 288

DIRECTORY—Copyright - - - 279
See Copyright in Directory.

DISCOVERY—Executor's accounts - - 573
See Executor's Accounts.

DISCRETION — Judge—Appointment of official liquidator - - - 597, 644
See Official Liquidator. 1, 2.

DISPOSITIONS BEFORE WINDING-UP ORDER—*Company—Companies Act*, 1862, *s.* 153—*Accept-*

DISPOSITIONS BEFORE WINDING-UP ORDER—*continued.*

ance of Bill of Exchange.] After the commencement of the voluntary winding-up of a company, but before the notice of it appeared in the *London Gazette*, one of the directors, who had also been appointed one of the liquidators, accepted a bill of exchange on behalf of the company. He had no special authority to accept the bill for the other liquidators, and no notice appeared on the acceptance that the company was in liquidation:—*Held* (affirming the decision of *Stuart*, V.C.), that this was not a disposition of the property of the company under the 153rd section of the *Companies Act*, 1862, and that the holder of the bill could not prove for the amount. *In re* London and Mediterranean Bank. Bolognesi's Case 567

DOCUMENTS—Production of - 495, 497
See Production of Documents. 1, 2.

EASEMENT—Alteration of - - 163
See Light and Air.

ECCLESIASTICAL COMMISSIONERS - 214
See Renewable Leaseholds.

ENFORCING AGREEMENT FOR ARBITRATION—*Profits of Partnership.*] Where two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement:—*Held*, that though the valuation could not be so made, because no umpire was provided, the Court would carry the partnership agreement into effect by ascertaining the value of the share.—Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will itself, if necessary, ascertain the value.—Where profits are left by a partner in a business he will not, in the absence of a special agreement, be allowed interest on them.—In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital with interest thereon (if necessary) is to be deducted; the residue will represent the profits.—Decree of *Stuart*, V.C., affirmed. Dinham *v.* Bradford - - - - 519

2. —— *Vendor and Purchaser—Specific Performance—Valuation.*] By the contract for the sale of an estate it was agreed that the price should be £24,000, and it was further agreed, amongst other things, that certain furniture and other articles on the estate, the value of which was about £2000, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and refused to complete.—Decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles.—Decree of *Stuart*, V.C., affirmed, with a variation. Richardson *v.* Smith [648

ENFRANCHISEMENT—Leaseholds - 214
See Renewable Leaseholds.

EQUITY OF REDEMPTION — Agreement to release - - - - - 3
See Abandoned Agreement.

EVIDENCE—Presumption of death - 139
See Presumption of Death.

—— Professional privilege - - - 703
See Privileged Communication.

EX PARTE ORDER—*Bankruptcy.*] A Commissioner in Bankruptcy examined, as to his receipts on account of the bankrupt's estate, a solicitor who had been a solicitor to a former assignee, and who was now attending on behalf of another party, and had not been summoned to be examined. The solicitor admitted the receipt of certain moneys, but claimed deductions. The Commissioner required him to pay the amount of receipts to the assignee without deductions, and about three weeks afterwards, without any notice to him, made an order to that effect:—*Held*, that whatever the merits of the case might be, the order must be discharged, as having been made without giving the solicitor a proper opportunity of defending himself. *Ex parte* Prance. *In re* Kemp - - - - - - 16

EX PARTE WARING (19 Ves. 345)—Doctrine of - - - - - 773
See Securities for Bills of Exchange. 2.

EXECUTION—Debenture holder—Injunction 67
See Scheme of Arrangement.

EXECUTOR—Accounts—Refusal to produce 573
See Executor's Accounts.

—— Deceased shareholder—Liability - 725
See Deceased Shareholder.

—— Indian—English probate - - 314
See Foreign Executor.

—— Power to pledge assets—Preference of one creditor - - - - 663
See Power to pledge Assets.

EXECUTOR'S ACCOUNTS — *Pleading—Answer—Exceptions—Insufficiency.*] The widow of a testator carried on his business under a direction in the will that the executors should allow her to carry it on, and to have, while carrying it on, the use of the capital employed in it, and of his other personal estate. After her death, the Plaintiffs, who had supplied her with goods for the purposes of the business, filed their bill against the testator's personal representative, claiming a lien on the funds employed in the trade, and by their interrogatories asked for accounts of the testator's personal estate and of the personal estate employed in the business. The executor declined to set forth the accounts, on the ground that if it should be decided at the hearing that the Plaintiffs had no such lien as they claimed, the discovery would be useless:—*Held* (reversing the decision of *Malins*, V.C.), that the executor was bound to give the account. Thompson *v.* Dunn - - - - 573

EXTINCTION OF POWER—Alienation of estate—Mortgage—Bankruptcy - - 193
See Power to renew Leases.

FEE SIMPLE—Devise, without words of limitation - - - - - 408
See Devise without Words of Limitation.

FEES—Counsel—Liability of client - 457
See Counsel's Fees.

FINES—Renewal of leases—Right to keep fines
See Power to renew Leases. [193

"FIRST-CLASS STATION" — *Specific Performance—Railway Company—Jurisdiction.*] On the purchase of land by a railway company in 1838, the company covenanted with the landowners that a piece of the land purchased should for ever thereafter be used as a first-class station. The station was built, and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1869 the landowner filed a bill to compel the company to build a larger station, and to stop all the trains at that station:—*Held*, that as the existing station had not been objected to, and had remained for many years, and as it did not appear that the passengers were numerous the Court would not compel a larger station to be built; but that as many trains as stopped at any other station between the termini of the original railway, excepting mail, express, and special trains, must stop at this station.—Decree of *James*, V.C., partly affirmed and partly reversed. Hood *v.* North Eastern Railway Company - - 525

FOREIGN EXECUTOR — *Payment to — English Probate—Foreign Creditor—Bona notabilia.*] A chartered bank, whose head office was in *England*, but whose business was chiefly carried on in *India*, was ordered to be wound up, and the Indian assets were remitted to this country. A creditor domiciled in *India* proved his debt, received a dividend and died, leaving a will which was proved in *India*. After his death a final dividend became payable:—*Held* (reversing the decision of the Master of the Rolls), that the dividend ought not to be at once remitted to the executors in *India*, but could only be paid to them on their producing a properly stamped English probate. *In re* Commercial Bank Corporation of India and the East. Fernandes' Executor's Case - - - 314

FORFEITURE OF SHARES — *Company — Winding-up—Contributory—Past Member—Companies Act*, 1862, *s.* 38, *clause* 3.] The articles of a company provided that shares might be forfeited for non-payment of a call, and that the forfeiture of any share should involve the extinction of all interest in and all claims and demands against the company in respect of the share, and all other rights incident to the share.—*C.* was the original holder of shares which were forfeited for non-payment of a call less than a year before the winding up of the company:—*Held* (affirming the decision of the Master of the Rolls), that *C.* was properly placed upon the list of past members as a contributory.—The liability of a past member is entirely created by the *Companies Act*, 1862, and it is immaterial whether his shares have been transferred or have been extinguished by forfeiture.—*Bridger's and Neill's Case* (Law Rep. 4 Ch. 266) held to apply. *In re* Blakely Ordnance Company. Creyke's Case. - 63

2. —— *Collusive Forfeiture—Ultrà vires Act—Power of Directors to compromise Disputes—Lapse of Time.*] *D.* agreed in the year 1846, at the instance of the local manager, to become a director of an unlimited company, on the understanding that he should incur no responsibility as a shareholder until an Act of Parliament had been obtained limiting the responsibility of the shareholders. Ten shares were accordingly allotted to *D.*, and he was entered on the list of shareholders, and subsequently signed a document appointing a proxy to vote for him at a meeting of shareholders, and he also received a dividend on the ten shares. In 1848 an Act of Parliament was applied for, but was not obtained. In the same year *D.* wrote to the local manager, through whom he had obtained the shares, reminding him of the circumstances, and repudiating his liability for calls. In 1849 the directors, at the request of the local manager, who represented to them that the credit of the company might suffer, cancelled *D.*'s shares on payment of all past calls. The directors had power to compromise disputed claims against the company, but had no power to cancel shares, except by forfeiture for non-payment of calls. The company was wound up in 1861: — *Held* (reversing the decision of the Master of the Rolls), that as there was no dispute between the company and *D.* as to the fact of his being a member of the company, the cancellation of his shares by the directors was *ultrà vires*, and that the lapse of time was no bar to the claim against him. His name was, therefore, placed on the list of contributories. — *Lord Belhaven's Case* (3 D. J. & S. 41) distinguished.—*Spackman* v. *Evans* (Law Rep. 3 H. L. 171) followed. *In re* Agriculturist Cattle Insurance Company. Dixon's Case - - - - - 79

FRAUD—Appointment - - 40, 203
See Fraudulent Appointment. 1, 2.

—— Conveyance to defeat creditors 538, 577
See Fraudulent Conveyance. 1, 2.

—— Director—Power to make calls - 559
See Transfer of Shares.

—— Overdue bill of exchange—Equities affecting holder - - - - 358
See Overdue Bill of Exchange.

FRAUDULENT APPOINTMENT — *Intention — Motive of Appointor.*] A settlor by deed declared that trustees should hold certain funds after his death upon trust for his daughters, *H.* and *M.*, or one of them, as his son should appoint, and in default of appointment should pay the dividends to *H.* and *M.* in equal shares during their joint lives, with remainders over.—At the time when the settlement was made, the settlor objected to the proposed marriage of *M.*, and made the settlement in order that in the event of the marriage the income should be appointed as to one-half for *H.*, and as to the other half, to be dealt with according to circumstances.—After the death of the settlor *M.* married, and the son thereupon appointed the income of the whole fund to *H.* for her life, reserving a power of revocation. *H.* was not informed that the appointment had been made, and it was shewn that the intention of the son and of *H.* was to accumulate one moiety of the income and hold it in suspense. In a suit instituted by *M.*, this appointment was declared void as a fraud upon the power.—The son then executed a second deed of appointment, appointing the income to *H.* during the joint lives of

FRAUDULENT APPOINTMENT—*continued.*
herself and *M.* absolutely. *H.* was informed that this appointment had been made, and she and the appointor deposed that there was no agreement between them as to the disposition of the income:—*Held* (affirming the decree of *James*, V.C.), that, under the circumstances, the second deed of appointment was void. TOPHAM *v.* DUKE OF PORTLAND - - - - - - 40

2. —— *Benefit to Appointor — Infancy of Appointee—Bargain between Appointor and Husband of Appointee.*] *A.* having an exclusive power of appointment among his children (five in number), who were entitled equally in default of appointment, in 1832, in pursuance of articles, on the marriage of a daughter, *C.* (who was of age), appointed a share to her, to be held upon the trusts to be declared by her marriage settlement. He also gave a bond for payment of an equal sum to the trustees. By the settlement, which followed the trusts of the articles, the funds were limited for the benefit of the husband and wife during their respective lives, and then for the benefit of their children, but the ultimate trust, in default of issue, was for *A.*, his executors, administrators, and assigns. There were no children of the marriage, and *C.* having survived her husband, who died in 1832, afterwards, in 1841, married the Plaintiff. In 1834 *A.* appointed another share to another of his daughters, *E.* (who was an infant), on her marriage, and gave a bond for payment of an equal sum to her trustees. The trusts of the settlement were similar to those of *C.'s* settlement, the trust in default of issue being for *A.*, his executors, administrators, and assigns.—In 1835 *A.* became bankrupt, and proofs were made by the trustees on the bonds, in respect of which considerable dividends were received. In 1866 *A.* died, and in 1867 *C.'s* and *E.'s* shares were paid to their respective trustees, and the other shares to the other children, and a release was taken from the parties interested. — *C.'s* share was afterwards paid into Court under the *Trustee Relief Act.*—*C.'s* husband filed a bill praying that the appointments to *C.* and *E.* might be declared frauds upon the power, and that the fund might be divided as in default of appointment:—*Held*, with regard to the appointment to *E.* (who was an infant at the time of her marriage), that the bargain under which *A.* reserved to himself an ultimate interest in the appointed fund was a bargain between *A.* and the intended husband, and was not corrupt or improper, so as to render the appointment invalid. The Court refused to make any declaration as to the appointment to *C.* (who was of age at the time of her marriage), because the fund had been paid into Court under the *Trustee Relief Act*, and the rights of all parties, including questions which had arisen under the bankruptcy, and were not in issue in the suit, could be better decided under that Act.—The decree of *James*, V.C., affirmed, but on different grounds. COOPER *v.* COOPER - - 203

FRAUDULENT CONVEYANCE—*Voluntary Settlement—Stat.* 13 *Eliz. c.* 5.] When a settlement is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect; but, *semble*, the mere fact that it has, in the event, prevented a creditor, who was such when it was made, from obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.—*Spirett* v. *Willows* (3 D. J. & S. 293) considered.—Decree of *James*, V.C., affirmed. FREEMAN *v.* POPE - - - - 538

2. —— *Act of Bankruptcy—Fraudulent Preference—Lapse of Twelve Months.*] Seventeen months before his bankruptcy, a trader assigned by deed all his estate and effects by way of security for the repayment of a sum then due, and of a further advance of a moderate amount:—*Held*, that, under the circumstances, the deed was not void under the 13 Eliz. c. 5, or as an act of bankruptcy:—*Semble*, also, that even if there had not been a further advance to the bankrupt, the lapse of twelve months before the bankruptcy prevented the deed from being invalidated as an act of bankruptcy.—Decree of *Malins*, V.C., affirmed.—ALLEN *v.* BONNETT - - - - 577

FRAUDULENT PREFERENCE - - 577
See FRAUDULENT CONVEYANCE. 2.

FUND IN COURT—Staying proceedings pending appeal - - - - 720
See STAYING PROCEEDINGS. 2.

GENERAL BEQUEST—Execution of appointment [26
See APPOINTMENT BY GENERAL BEQUEST.

GENERAL ORDER, NOV. 1, 1862, r. 20 - 18
See CREDITOR HOLDING SECURITY. 1.

GENERAL RULES IN BANKRUPTCY, 1870, rules 143, 319 - - 470, 482
See BANKRUPTCY APPEAL. 1, 3.

—— **rules 158, 159** - - - - 741
See DEBTOR SUMMONS. 1.

—— **rule 275** - - - - - 722
See MAJORITY OF CREDITORS.

GIFT, ORIGINAL OR SUBSTITUTIONAL—*Will—Class—Remoteness.*] Bequest of residue after the death of the testator's wife to the testator's children then living, and such issue then living of any children then deceased as should attain the age of twenty-three years as tenants in common according to the stocks and not to the individual objects, and so that the issue of deceased children might take by way of substitution the shares of their respective parents:—*Held*, void for remoteness.—Decision of *Malins*, V.C., reversed. SMITH *v.* SMITH - - - 342

2. —— *Will—Class, Period of ascertaining —Vested or contingent Gift.*] Personal estate was given by will to *S.* (a bachelor) for life, remainder to the eldest son of *S.* for life, remainder to *E.* for life, and after the death of *S.*, his eldest son, and *E.*, upon trust to transfer the same "to all and every the children of *S.* share and share alike, and the children of such of the children of *S.* as shall be then dead, according to the *Statute of Distributions;* but in case there shall be no child or grandchild of *S.* then living, upon trust to transfer the same to the children of *E.*":—*Held* (affirming the decision of *Malins*, V.C.), that the gift was void for remoteness, the

GIFT, ORIGINAL OR SUBSTITUTIONAL—*contd.* gift over shewing that it was not, as in *Bennett's Trust* (3 K. & J. 280), and *Baldwin* v. *Rogers* (3 D. M. & G. 649), a gift to all the children of *S.*, with a substitution of the children of such of them as died before the period of distribution, but a gift to a class of children and grandchildren to be ascertained at a period not confined within a life in being and twenty-one years. STUART *v.* COCKERELL - - - - - 713

HUSBAND AND WIFE—Agreement for separation - - - - - 336
See AGREEMENT FOR SEPARATION.

—— Next friend—Appeal - - - 274
See NEXT FRIEND.

—— Reduction into possession—Mortgage 655
See PAYMENT OF MORTGAGE DEBT.

—— Sale by - - - - - - 534
See SALE BY HUSBAND AND WIFE.

—— Separate estate, liability of - - 274
See NEXT FRIEND.

—— Wife administratrix—Suit by wife alone 233
See LIMITATIONS, STATUTE OF. 2.

IMPLICATION—Fee simple—Implied from gift over - - - - - - 408
See DEVISE WITHOUT WORDS OF LIMITATION.

INCOME—*Corpus*—Charge of annuity - 684
See ANNUITY CHARGED ON CORPUS.

INDIAN PROBATE - - - - - 314
See FOREIGN EXECUTOR.

INEQUALITY—Creditors' deed - - 332
See UNREASONABLENESS OF CREDITORS' DEED.

INFANT—Appointee—Bargain with appointor 203
See FRAUDULENT APPOINTMENT. 2.

—— Transferee of shares 298, 302, 614
See INFANT TRANSFEREE. 1—3.

INFANT TRANSFEREE—*Company*—*Contributory*—*Termination of Infancy after Commencement of Winding-up.*] Where shares had been transferred to an infant, and his name had been placed on the register, the company being ignorant of the fact of his infancy, and he did not come of age till after the commencement of the winding-up:—*Held* (affirming the decision of *Stuart*, V.C.), that the official liquidator might refuse to accept him as a shareholder, although after coming of age he were willing to confirm the transfer.—*Castello's Case* (Law Rep. 8 Eq. 504) approved of. *In re* ASIATIC BANKING CORPORATION. SYMONS' CASE - - - - 298

2. —— *Company*—*Contributory*—*Acquiescence*—*Ratification.*] An infant applied for shares in a company, shares were allotted to him, and he was entered on the register. He attained his majority on the 8th of April, 1864, and the company went on till June, 1865, when an order for winding it up was made. During this period, though he did not appear to have acted as a shareholder, he never took any step to repudiate the shares:—*Held*, that he was bound by his acquiescence and must be placed on the list of contributories.—The decision of the Master of the Rolls affirmed. *In re* CONSTANTINOPLE AND ALEXANDRIA HOTEL COMPANY. EBBETTS' CASE [302

3. —— *Winding-up* — *Contributory* — *Scripholder.*] *Edward W.* was the holder of shares in a company, the shares in which passed by delivery of the certificates. Resolutions were passed in July, 1866, at a meeting which *E. W.* attended and took part in, to register the company as a limited company under the *Companies Act*, 1862. Shortly afterwards *E. W.* gave his certificates to his son *Ernest Mortimer W.*, aged seventeen, and living in his house. The certificates were sent in by the son and exchanged for shares, and the name of *Ernest Mortimer W.* was entered in the share register-book, and sent in to the Registrar of Joint Stock Companies upon the registration of the company in December, 1866. *Edward W.* also bought some shares in the name of his son, and they were so registered.—In February, 1867, *Edward W.* informed the managing director that he had parted with his shares; and in June, 1867, in answer to a repeated application for calls, *Ernest Mortimer W.* wrote that he was unable to pay, and, as to legal proceedings, was an infant. No steps as to these shares were taken by the company until after the winding-up in February, 1869:—*Held*, that *Edward W.* was liable as a contributory in respect of the shares.—Decision of *James*, V.C., affirmed. *In re* COBRE COPPER MINING COMPANY. WESTON'S CASE. - - - - 614

INFRINGEMENT OF PATENT—*Improvement*—*Combination*—*Novelty*—*Second Patent*—*Specification.*] Under a patent for an arrangement and combination of parts, protection will not be given against the use of any particular part which is not novel. The adaptation of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps and to other glazed surfaces, cannot of itself be the subject of a patent.—Requisites of a specification for a combination including improvements on a former patent, considered.—Observations on *Lister* v. *Leather* (8 E. & B. 1004), and *Foxwell* v. *Bostock* (12 W. R. 723).—Decision of *James*, V.C., affirmed. PARKES *v.* STEVENS - - - - 36

INJUNCTION—Assumption of name of firm 155
See RIGHT TO NAME OF FIRM.

—— Bankruptcy — Restraining dealing with assets - - - - - 473
See INJUNCTION IN BANKRUPTCY.

—— Bankruptcy—Staying proceedings on debtor summons - - - - - 743
See STAYING PROCEEDINGS IN BANKRUPTCY.

—— Execution by debenture holder - 67
See SCHEME OF ARRANGEMENT.

—— Light and air - - - - 163
See LIGHT AND AIR.

—— Pollution of river - - - 583
See POLLUTION OF RIVER.

—— Railway company—Vendor's lien - 414
See LIEN AGAINST RAILWAY COMPANY.

—— Restraining an application to Parliament [671
See RESTRAINING APPLICATION TO PARLIAMENT.

INJUNCTION—*continued.*

—— Tenant in common destroying and wasting property - - - - 180
See Partition Suit. 1.

—— *Ultrà vires* act of company—*Locus standi* of Plaintiff - - - - 621
See Restraining Ultrà Vires Act.

INJUNCTION IN BANKRUPTCY—*Bankruptcy—Injunction—Undertaking—Bankruptcy Act*, 1869, *ss.* 13, 65, 66—*Bankruptcy Repeal Act*, 1869, *s.* 20.] Under the *Bankruptcy Act*, 1869, the Court of Bankruptcy has jurisdiction to grant in a summary way, an injunction to restrain a person not a party to the bankruptcy proceedings from dealing with property alleged to have been fraudulently assigned before the bankruptcy; and such an injunction may be granted *ex parte* on such a case being made as would induce the Court of Chancery to grant it upon bill filed to impeach the assignment.—This jurisdiction may be exercised in a bankruptcy commenced under the *Bankruptcy Act*, 1861, and transferred under the 130th section of the Act of 1869.—The person obtaining such an order must give an unqualified undertaking to be answerable for damages, not merely an undertaking to be answerable for damages out of the assets; and also an undertaking to institute, within a limited time, proceedings to set aside the alleged fraudulent assignment. *Ex parte* Anderson. *In re* Anderson - - - - - - - 473

INSPECTION—Part of deed - - - 497
See Production of Documents. 2.

INSPECTORSHIP DEED—Assent of creditors—Proof of - - - - 746
See Trusts of Creditors' Deed. 2.

INSTROKE—Working by—Mine - - 103
See Mining Lease.

INSURANCE COMPANY—Persons assuring to be directors - - - - 283
See Directors de facto.

—— Transfer of business 118, 381, 632, 640
See Novation of Contract. 1—4.

INTENTION—Fraudulent appointment 40
See Fraudulent Appointment. 1.

INTEREST—Debts in winding-up 86, 88, 112
See Interest in Winding-up. 1—3.

—— Employing money in business—Compound interest - - - - 233
See Limitations, Statute of. 2.

—— Partnership—Profits left in the business 519
See Enforcing Agreement for Arbitration. 1.

INTEREST IN WINDING-UP—*Proof against two Estates.*] The rule that a creditor of a company which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding-up, does not prevent a creditor who has a right of proof for the same debt against the estates of two companies in liquidation from receiving dividends from both estates until the full amount of his debt and interest has been satisfied.—The decision of the Master of the Rolls reversed. *In re* Joint Stock Discount Company. Warrant Finance Company's Case - - - - - 86

INTEREST IN WINDING-UP—*continued.*

2. —— *Secured Creditor — Practice — Appeal from Order in Chambers.*] The rule that a creditor of a company which is being wound up is not entitled to dividends towards payment of interest accrued since the commencement of the winding-up does not prevent a creditor who holds a security from receiving dividends to the full amount of the principal, and at the same time realising his security until the full amount of principal and interest has been satisfied.—In such a case it makes no difference that the security is on part of the estate of the company, or that it is vested in trustees on behalf of the creditors and the company.—The decision of the Master of the Rolls reversed.—No appeal will be allowed from an order made in Chambers unless the Judge certifies that the case has been so fully argued before him in Chambers that he does not require it to be re-argued in Court. *In re* Humber Ironworks and Shipbuilding Company. Warrant Finance Company's Case. (No. 2) - - 88

3. —— *Leave to Appeal—Retrospective Effect of Decision of the Court.*] The decision in the *Warrant Finance Company's Case* (Law Rep. 4 Ch. 643) that no proof can be made in the winding up of an insolvent company for interest later than the commencement of the winding-up, was not merely a settlement of the practice for the future, but a declaration of the law as it then stood.—Therefore, where an order for payment of a debt with interest to the date of the proof had been made before the decision of the above-mentioned case, the order was corrected on appeal, leave being given to extend the time for appeal limited by the 124th section of the *Companies Act*, 1862. *In re* Contract Corporation. Ebbw Vale Company's Case - - - 112

IRISH BANKRUPTCY—Enforcing order in *England* - - - - -
See Irish Winding-up.

IRISH WINDING-UP — *Companies Act*, 1862, *s.* 122—*Winding-up—Irish Order.*] An order for a call was made by the Court of Bankruptcy in *Ireland* in a winding-up remitted to it by the Court of Chancery in *Ireland*:—*Held*, that for the purpose of enforcing the call against contributories resident in *England*, the order must be made an order of the Court of Chancery in *England*, and that there was no jurisdiction to make it an order of the Court of Bankruptcy in *England*. *In re* Hollyford Copper Mining Company - - - - - 93

ISSUE AT LAW—*Practice*—25 *&* 26 *Vict. c.* 42 (*Sir John Rolt's Act*).] There is no inflexible rule as to the stage of a cause in which issues will, on the application of a Defendant, be directed to be tried by a jury; the matter being one for the discretion of the Court. If, however, in an injunction suit, the Defendant makes the application, not on the occasion of a motion for an injunction, or a motion to dissolve an injunction, but by an independent motion at any other time, and especially if it is after the disclosure of the Plaintiff's evidence, the Court will require very strong proof that the case is one which the Court itself cannot satisfactorily try.—Decision of *James*, V.C., affirmed. Roskell *v.* Whitworth - 459

JOINT OWNERSHIP OF DOCUMENTS - 495
See PRODUCTION OF DOCUMENTS. 1.

JURISDICTION—Chancery—Application to Parliament - - - - 671
See RESTRAINING APPLICATION TO PARLIAMENT.

—— Creditors' deed—Administration of trusts [219, 746
See TRUSTS OF CREDITORS' DEED. 1, 2.

—— Irish Court of Bankruptcy enforcing order in *England* - - - - 93
See IRISH WINDING-UP.

—— Trustee Relief Act—Costs - - 170
See TRUSTEE RELIEF ACT.

KNOWLEDGE—Director—Presence at meeting—Liability - - - - 763
See MISCONDUCT OF DIRECTOR.

LACHES—Assumption of name of firm - 155
See RIGHT TO NAME OF FIRM.

—— Forfeiture of shares - - - 79
See FORFEITURE OF SHARES. 2.

LAPSE—Covenant to settle by will - 182
See WILL IN PURSUANCE OF MARRIAGE ARTICLES.

LAW OFFICER—Reference to—Patent 1, 518
See SEALING OF PATENT. 1, 2.

LEASE—Mine—Working by mistake - 103
See MINING LEASE.

—— Power to renew—Right to fines - 193
See POWER TO RENEW LEASES.

LEASEHOLDS—Renewable—Enfranchisement of [214
See RENEWABLE LEASEHOLDS.

LEAVING ISSUE - - - - - 244
See DEATH COUPLED WITH CONTINGENCY.

LEGAL TITLE—Partition suit—Plaintiff out of possession - - - - 546
See PARTITION SUIT. 3.

LEGALITY—Rules of building society 4, 309
See BUILDING SOCIETY. 1, 2.

LETTER OF CREDIT - - - - 107
See CREDITOR HOLDING SECURITY. 2.

LIABILITY—Executors of deceased shareholder [725
See DECEASED SHAREHOLDER.

—— Mortgagee—Debt paid into Court - 655
See PAYMENT OF MORTGAGE DEBT.

—— Separate estate of married woman - 274
See NEXT FRIEND.

LIEN—Purchase-money—Railway company 414
See VENDOR'S LIEN AGAINST RAILWAY COMPANY.

LIFE INSURANCE——Policy effected by creditor—Right to policy - - 32, 515
See POLICY EFFECTED BY CREDITOR. 1, 2.

—— Policy granted by persons not truly directors - - - - - 288
See DIRECTORS DE FACTO.

—— Priority of policies - - - 424
See PRIORITY OF POLICIES.

—— Transfer of policies to another office [118, 381, 632, 649
See NOVATION OF CONTRACT. 1—4.

LIGHT AND AIR—*Alteration of Easement—Diminution of Light by Plaintiff—Relief in Equity.*] Where ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light will not in itself preclude him from obtaining an injunction against the person causing the obstruction.—The Defendant built a wall to the north of the windows of the Plaintiff's house, by which his ancient lights were interfered with. The Plaintiff was at the same time enlarging his own premises, whereby he diminished the light coming to his own windows by shutting off some of the light from the south and south-west:—*Held* (reversing the decision of *Stuart*, V.C.), that the Plaintiff was entitled to an injunction.—The doctrine of *Tapling* v. *Jones* (11 H. L. C. 290) *held* to apply to the equitable as well as to the legal remedy.—*Heath* v. *Bucknall* (Law Rep. 8 Eq. 1) observed upon. STAIGHT *v.* BURN - - - 163

LIMITATIONS, STATUTE OF—*Marriage Settlement—Breach of Trust on the Part of the Settlor—Covenant to settle.*] By a post-nuptial settlement dated in 1814, made in pursuance of an antenuptial agreement, after reciting that the husband had agreed to settle £1000 in manner thereinafter mentioned, and to enter into the covenants thereinafter contained, and reciting that this sum of £1000 had been paid to *G.*, it was witnessed that *G.* covenanted with the settlor that he would hold the £1000 upon trust, with the approbation of the settlor, to invest it, in the joint names of the settlor and himself, either in the public funds or in government or real securities, and would hold the trust funds and securities upon trust for the settlor and his wife during their respective lives, and after their death upon trust for the benefit of their children; and the settlor covenanted that he would at the expiration of twelve months pay to *G.* another sum of £1000, to be held by him upon the same trusts as the first sum.—*G.* died in 1821, and the settlor, having survived his wife, died in 1868. Neither of the sums of £1000 were really paid to *G.*, or invested in the joint names of *G.* and the settlor:—*Held*, on a claim by the children in a suit instituted for the administration of the settlor's estate: First, that the settlor had constituted himself a trustee of the first sum of £1000, and that his estate was liable for his breach of trust in not seeing that it was invested, notwithstanding the *Statute of Limitations*; secondly, that as to the second sum of £1000, the settlor was in the position of a simple covenantor, and that the remedy of the claimants for his breach of the covenant was barred by the *Statute of Limitations*.—The decision of *James*, V.C., varied. STONE *v.* STONE - - - - - - 74

2. —— *Time of suing as against Administrator—Agent—Solicitor—Account—Compound Interest—Employing Money in Business—Pleading—Married Woman Administratrix.*] An agent who stands in a fiduciary relation to his principal cannot set up the *Statute of Limitations* in bar of a suit for an account by his principal.—An agent, who was a solicitor in *London*, held a power of attorney from his principal in *America* to sell his property and invest the proceeds in his name. The agent received certain moneys under the

LIMITATIONS, STATUTE OF—*continued.*

power and paid them in to his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account:—*Held*, that the agent held the money in trust for his principal, and, therefore, the *Statute of Limitations* was no bar to the suit.—*Semble*, that if there had been no fiduciary relation between the parties, inasmuch as the agency lasted till the death of the principal, the *Statute of Limitations* would not have begun to run till administration was taken out.—There being no proof that the agent had made any interest or profit by the money in his hands, he was charged with simple interest at £5 per cent.—Compound interest will only be given against an accounting party when he has employed the money in business. *Quære*, whether it can be given without a case for it being expressly made by the bill.—Mixing the money with the ordinary account of a firm of solicitors at a bankers is not such employment in business as will render a member of the firm liable to compound interest.—The decree of *Stuart*, V.C., affirmed with variations.—A married woman administratrix filed a bill by her next friend against an accounting party to the estate of the intestate, making her husband a co-Defendant:—*Held*, that the other Defendant might have demurred; but as no objection was made till the hearing, the Court allowed the bill to be amended, making the husband and wife co-Plaintiffs.—*In re Hindmarsh* (1 Dr. & Sm. 129) commented on. BURDICK *v.* GARRICK - 233

3. —— *Copyholds—Seizure quousque—Statute of Limitations.*] Where the lord had seized copyholds *quousque*, and had held them for nearly forty years:—*Held*, that a bill by the heir of the former tenant to compel admittance by the lord was a suit to recover land within the meaning of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), ss. 2, 3, and that the right of the heir was barred by that statute.—Decision of *Malins*, V.C., affirmed. WALTERS *v.* WEBB - - 531

LIQUIDATION BY ARRANGEMENT—Staying proceedings in bankruptcy - 743
See STAYING PROCEEDINGS IN BANKRUPTCY.

—— Voting of creditors - - - 722
See MAJORITY OF CREDITORS.

LIQUIDATOR—Appointment as receiver - 420
See RECEIVER.

—— Duty to bring in his accounts - 437
See LIQUIDATOR'S ACCOUNTS.

—— Power to rectify register - - 559
See TRANSFER OF SHARES.

LIQUIDATOR'S ACCOUNTS—*Winding-up under Supervision—Sanction of Court—Companies Act, 1862, ss. 139, 151, 160.*] The *A. R. Company*, in *England*, passed a resolution for voluntary winding-up, with a view to disposing of its undertaking to the *A. P. Company*, to be formed in *Rome* for that purpose. An order for continuing the voluntary winding-up under the supervision of the Court was shortly afterwards made. Disputes having arisen, the liquidator entered into an arrangement with the *A. P. Company*, under

LIQUIDATOR'S ACCOUNTS—*continued.*

which each fully paid-up shareholder of the *A. R. Company* was entitled to receive an equal number of shares of the same amount in the *A. P. Company*, and a number of other shares in the *A. P. Company* were given to the liquidator to be disposed of for the benefit of the *A. R. Company*. *W.*, a holder of twenty paid-up £20 shares in the *A. R. Company*, received twenty shares in the *A. P. Company* for his shares, and also took and paid for (at par) five of the *A. P.* shares which were at the disposal of the liquidator. This was done under an agreement by which the liquidator contended that *W.* ceased to have any interest in the *A. R. Company*, and accordingly removed his name from the list of contributories. These transactions were all sanctioned by general meetings of contributories, but not by the Court. *W.* afterwards took out a summons for the liquidator to bring in his account, which was ordered by the Master of the Rolls:—*Held*, that *W.* had not agreed to give up his interest in the company, and had a *locus standi*; but—*Semble*, if the arrangements had involved an agreement by him to give up all interest in the company, he would have had no *locus standi*, for that, under ss. 139, 151, and 160 of the *Companies Act*, 1862, the liquidator, though the winding-up was under supervision, had power to enter into the arrangement, with the sanction of meetings of the contributories, and that the sanction of the Court was not necessary, the Court not having given any directions restricting the exercise of his powers:—*Held*, that the liquidator had properly been ordered to bring in his account, though the interest of the applicant was exceedingly small. —Order of the Master of the Rolls affirmed. *In re* ANGLO-ROMANO WATER COMPANY. WRIGHT'S CASE - - - - - - 437

LOCAL BOARD OF HEALTH - - 583
See POLLUTION OF RIVER.

LUNACY—Allowance to next of kin - 699
See ALLOWANCE TO NEXT OF KIN OF LUNATIC.

—— Trustee Act, 1850—Appointment of new trustee - - - 662, 698
See TRUSTEE ACT, 1850. 2, 3.

—— Trustee Act—Surrender of copyholds 72
See TRUSTEE ACT, 1850. 1.

MAJORITY OF CREDITORS—*Bankruptcy Act, 1869, ss. 16, 125, 126—Gen. Ord. in Bankruptcy, Jan. 1, 1870, Rule 275—Voting.*] At a meeting of creditors resolutions were proposed for a liquidation by arrangement. A large creditor attended by proxy and opposed the resolutions, and voted against them on the shew of hands, but afterwards signed them. If this creditor were excluded, the resolutions were not passed by the requisite majority:—*Held* (affirming the decision of the Chief Judge), that the resolutions were duly passed and ought to be registered; for that, according to the Act, the votes of the signing creditors were determined by their signatures; and the course which they had taken at the meeting could not be looked to. *Ex parte* POOLEY, *In re* RUSSELL - - - - 722

MARRIAGE SETTLEMENT—Covenant to settle by deed or will - - - - 182
See Will in pursuance of Marriage Articles.

—— Non-investment of funds—Statute of Limitations - - - - 74
See Statute of Limitations. 1.

MEMORANDUM OF ASSOCIATION—Subscriber of - - - - - - .
See Cases collected under Subscriber of Memorandum.

MINE—Lease—Working by instroke - 103
See Mining Lease.

MINING LEASE—*Agreement—Working by Instroke—Irremediable Damage—Word "win"—Evidence of Expert.*] The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bonâ fide* taken with ordinary dispatch to win and work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal:—*Held*, that, under the circumstances, working the coal by instroke was working in a proper and workmanlike manner, and that if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement:—*Held*, that as the lessees were actually working the coal, irremediable damage would not be presumed.—*Quære*, as to the meaning of the word "win."—*Semble*, that the lessor was not entitled to the dead rent for the first three years. Lewis *v.* Fothergill - 103

MISCONDUCT OF DIRECTORS—*Directors—Fraud—Meeting—Knowledge—Liability—Bill of Review.*] The directors of a company, part of the business of which was to make loans, appointed an executive committee. The committee, in order to raise the price of the shares, bought shares in the names of the secretary and another, and in order to pay for these shares drew cheques on the bankers of the company. These cheques were reported to a meeting of the directors as having been drawn for loans and approved of by them, and the money was applied accordingly. There was evidence that the transaction was explained to some of the directors; but one of the directors was present during part of the meeting only, and denied all knowledge of the transaction:—The Master of the Rolls held the directors generally liable to repay the money to the company; but, on appeal:—*Held*, that the director, who denied all knowledge of the transaction, was, under the circumstances, not liable to repay the money.—*Quære*, whether leave will be given to file a bill of review when, after decree, an important witness states that he has made a mistake in his evidence in the suit. Land Credit Company of Ireland *v.* Lord Fermoy - - 763

MISCONDUCT OF DIRECTORS—*continued.*

MISTAKE—Purchase by railway company—Notice to treat - - - - 251
See Notice to treat.

—— Witness—Leave to file bill of review 763
See Misconduct of Directors.

MORTGAGE—Deed—Production of, by mortgagee
See Production of Documents. 2. [497

—— Payment into Court of Exchequer - 655
See Payment of Mortgage Debt.

—— Proof in winding-up—Proof after sale 433
See Proof by Mortgagee.

—— Reconveyance - - - - 227
See Reconveyance of Mortgage.

—— Release of equity of redemption—Mortgagee in possession - - 3
See Abandoned Agreement.

—— Security for bills of exchange - 773
See Securities for Bills of Exchange. 2.

MULTIFARIOUSNESS—Administration suit—Person in possession of assets - 663
See Power to pledge Assets.

NAME OF FIRM—Assumption of - - 155
See Right to Name of Firm.

NEXT FRIEND—*Practice—Appeal—Debt of Married Woman—Creditor on Separate Estate.*] A married woman is not entitled to present a Petition of Appeal without a next friend, although another person joins in the Petition, and the suit relates to her separate estate.—Where a married woman contracts a debt which she can only satisfy out of her separate estate, her separate estate will, in equity, be made liable to the debt. Decree of *Stuart*, V.C., varied. Picard *v.* Hine - 274

NEXT OF KIN—Lunatic—Allowance to - 699
See Allowance to Next of Kin of Lunatic.

NON-TRADER—Privilege of Parliament—Bankruptcy - - - - 172
See Privilege of Parliament.

NOTICE—Allotment of shares - - 489
See Acceptance of Shares. 3.

—— Assignment of contract—Purchase - 604
See Sub-Contract.

—— Overdue bill of exchange - - 358
See Overdue Bill of Exchange.

NOTICE TO TREAT—*Railway Company—Injunction—Old Notice to Treat—Mistake or Inadvertence—Value of Land.*] A railway company, in 1856, took possession of a meadow, a large part of which belonged to one owner and a small part to another, who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an action of ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed his bill to restrain them.—The company offered to pay the value of the land as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave

NOTICE TO TREAT—*continued.*
notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them:—*Held*, that, under the circumstances, the company were not entitled to proceed under the notice to treat:—*Held*, that, under the circumstances, there had been no mistake or inadvertence so as to bring the case under sect. 124 of the *Lands Clauses Consolidation Act*:—*Held*, that the Plaintiff was entitled to a decree in both suits: and the Plaintiff submitting to have the land valued, and the Defendants preferring such a decree to an injunction, decree made for an inquiry as to the present value of the land, and the mesne profits for six years, and for payment by the company accordingly.—Decrees of *Malins*, V.C., reversed. STRETTON *v.* GREAT WESTERN AND BRENTFORD RAILWAY COMPANY - - 751

NOVATION OF CONTRACT—*Annuity granted by Life Insurance Society—Amalgamation—Policy-holders—Companies Act*, 1862, *s.* 199—*Unregistered Company dissolved before passing of the Act—Jurisdiction—Place of Business of Dissolved Company.*] Company *A.*, a life assurance society, granted an annuity, charged upon the assets of the company, to the petitioner. Afterwards the company was dissolved by resolutions of the shareholders, and its assets transferred to company *B.* By the deed of transfer it was agreed that all the liabilities of company *A.* should be paid out of the assets of company *B.*, and that company *B.* should indemnify company *A.* against them. It was also provided that both companies should use their best endeavours to induce the policy-holders and grantees of company *A.* to take in exchange policies and grants of company *B.* The Petitioner received his annuity under his grant from company *A.* before the amalgamation, and afterwards from company *B.*, and gave receipts in the name of company *B.*, until that company stopped payment, but his grant was never exchanged for a grant of company *B.*:—*Held*, that he had not accepted company *B.* as his debtor in place of company *A.* Although slight evidence is sufficient in the case of ordinary firms to shew that a creditor who continues his dealings with incoming partners accepts the new firm as his debtors instead of the old firm, yet strict proof will be required before it is held that a creditor of a company, under a special contract, has accepted the liability of another company with which the first is amalgamated.—An unregistered company was dissolved, its place of business abandoned, and its assets and liabilities transferred to another company, before the passing of the *Companies Act*, 1862. In 1869 a Petition was presented by a creditor, whose debt was still unsatisfied, to wind up the company:—*Held*, that the company was carrying on business for the purpose of winding-up its affairs within sect. 199, clause 1, and a winding-up order was accordingly made.—The decision of *James*, V.C., affirmed. *In re* FAMILY ENDOWMENT SOCIETY - - - - - - 118

2. —— *Insurance Company—Amalgamation—Policy-holders.*] *C.* insured his life in the *T. Company*, which afterwards, in 1857, made over its business to the *A. Company*. At the time of this transaction circulars were sent to *C.*, informing him that the *A. Company* would be responsible on the policy, and requesting him to pay future premiums to the *A. Company*, and to send his policy to the *A. Company* to be indorsed. *C.* never sent his policy to be indorsed, but paid the premiums to the *A. Company*, and in 1863 accepted a bonus. The *A. Company* having become insolvent shortly after the death of *C.*, *C.'s* assignee applied for an order to wind up the *T. Company*:—*Held* (affirming the decision of *James*, V.C.), that *C.* had accepted the *A. Company* as his debtor in place of the *T. Company*, and that the Petitioner had no *locus standi* to petition for the winding up of the *T. Company*. *In re* TIMES LIFE ASSURANCE AND GUARANTEE COMPANY - - - 381

3. —— *Insurance Company—Amalgamation—Policy-holders.*] A life assurance policy with profits was obtained from the *Anchor Company*; the *Anchor Company* afterwards transferred their business to the *Bank of London Association* under terms which appeared to keep the companies separate; and the *Association* was soon afterwards amalgamated with the *Albert Company*. Notices of these changes were given to the policy-holders, and the first receipt for a premium paid after the amalgamation with the *Albert Company* was in a special form; the subsequent receipts were merely receipts by the *Albert Company*, with the words "*Anchor Company*" on them. Three years after the amalgamation a bonus was declared by the *Albert Company*, and a sum of money was received as bonus by the policy-holder:—*Held*, that, under the circumstances, there had been a novation of contract with the *Albert Company*, and that the representatives of the policy-holder could not obtain an order to wind up the *Anchor Company*.—Order of *James*, V.C., discharged. *In re* ANCHOR ASSURANCE COMPANY - - - - 632

4. —— *Insurance Office — Amalgamation — Policy-holders.*] In 1862 the business and assets of the *Manchester Association* were transferred to the *Western Society*, which was afterwards incorporated with the *Albert Company*. A policy-holder in the *Manchester Association* paid his premiums at the different offices and took receipts, which mentioned the successive changes, the last receipts being in the name of the *Albert Company* alone:—*Held*, that the receipts did not disclose enough to fix the policy-holder with knowledge of what had taken place between the companies, and that his executors were entitled to obtain a winding-up order against the *Manchester Association*.—Order of *James*, V.C., affirmed. *In re* MANCHESTER AND LONDON LIFE ASSURANCE AND LOAN ASSOCIATION [640

NOVELTY OF PATENT - - - 36
See INFRINGEMENT OF PATENT.

NUISANCE—Pollution of river - - 583
See POLLUTION OF RIVER.

OCCUPATION RENT—*Vendor and Purchaser—Trade Premises.*] In July, 1867, the Plaintiff sold to a railway company a house in which he was carrying on the business of a victualler, the terms being that the purchase-money was to be paid on the 25th of March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in

OCCUPATION RENT—*continued.*
the meantime; and the Plaintiff was to be their tenant at a given rent, the tenancy not to be determined before the 25th of March, 1869, unless the company, after three months' notice, paid the money sooner, but to be determinable on the 25th of March, 1869, by a week's notice. The interest and rent were paid up to the 25th of March, 1869. The Plaintiff gave due notice to determine the tenancy on that day; but the company not having the purchase-money ready, he refused to give up possession, and in April filed a bill for specific performance. On the 18th of November, 1869, a decree for specific performance, with a declaration that the title had been accepted, and an order for payment of the purchase-money, with interest from the 25th of March, 1869, was made; and an inquiry was added whether, having regard to the circumstances and conduct of the parties, the company were entitled to any and what allowance in respect of the Plaintiff's occupation of the premises after the 25th of March, 1869:—*Held* (affirming the decision of *Stuart*, V.C.), that the company were not entitled to any allowance by way of occupation rent. LEGGOTT *v.* METROPOLITAN RAILWAY COMPANY - - - - 716

OFFICIAL LIQUIDATOR—*Appointment—Amalgamated Companies.*] In 1865 the *W.* assurance society made over its business to the *A.* company. In 1869 an order was made for winding up the *A.* company, and shortly afterwards a creditor of the *W.* society, who had not accepted the *A.* company as his debtor, obtained an order for winding up the *W.* society. After the transfer the *A.* company had carried on the business of the *W.* society, and all the transactions relative to that business were entered in the books of the *A.* company:—*Held* (affirming the decision of *James*, V.C.), that one of the liquidators of the *A.* company was the most proper person to be appointed liquidator of the *W.* society, as a great saving of expense would thus be effected, and directions might be given for appointing separate solicitors to represent the interests of the two companies if any question should arise between them. *In re* WESTERN LIFE ASSURANCE SOCIETY. *Ex parte* WILLETT - 396

2. —— *Appointment—Appeal—Discretion of Judge.*] *Held*, by the Master of the Rolls, that the person proposed to be official liquidator by the person who has obtained the winding-up order ought to be appointed in preference to another candidate, unless there is a strong feeling against him, or some reason to doubt his fairness, and that where the Chief Clerk had acted on that view the Court would affirm his decision, unless such objection to the person nominated was shewn:—*Held*, on appeal, that this rule was one which it was competent to a Judge to lay down for his own guidance, and that an appeal would not lie from an appointment on the ground of its having been based on that rule.—An appeal from the appointment of an official liquidator ought not to be allowed unless in a very special state of circumstances. *In re* ALBERT AVERAGE ASSURANCE ASSOCIATION - - - - - 597

3. —— *Appointment—Discretion of Judge—Appeal—Costs.*] The Petitioner in a winding-up is not as a matter of course entitled to appoint the official liquidator.—Where an official liquidator who is personally qualified for the office has been appointed by the Court below, his appointment will not be disturbed by the Court of Appeal.—Order of the Master of the Rolls affirmed. *In re* NORTHERN ASSAM TEA COMPANY - - 644

—— Rectification of register—Form of summons
See RECTIFICATION OF REGISTER - 95

OLD AUTHORITIES—Copyright in - 251
See COPYRIGHT IN OLD AUTHORITIES.

ORDER—*Ex parte*—Bankruptcy - - 16
See EX PARTE ORDER.

OVERDUE BILL OF EXCHANGE—*Notice—Fraud—Equities attaching to Bill of Exchange.*] *P.*, the manager of the *O.* bank, abstracted moneys of the bank, and bought with them, on the 21st of March, 1867, certain overdue bills of exchange. On the 4th of April, 1867, the *E.* company, promoted by *P.*, was registered, of which, till July in that year, *P.* was the sole director. On the 6th of April, 1867, *P.* sold these bills to the *E.* company, and paid himself for them out of their funds. The *E.* company were still the holders. The bills having been proved against the company on which they were drawn:—*Held*, that the *E.* company were not affected with notice of the title of the *O.* bank through the knowledge of *P.*, as *P.* could not be taken to have disclosed to the *E.* company his own fraud: but *held*, that the claim of the *O.* bank to the bills, as having been purchased with their money, was an equity attaching to the bills; that the *E.* company, having purchased them when overdue, took subject to this equity; and that the *O.* bank were entitled to the benefit of the proof. *In re* EUROPEAN BANK. *Ex parte* ORIENTAL COMMERCIAL BANK - - 358

PAID-UP SHARES—Subscriber to memorandum
11, 270, 346
See SUBSCRIBER TO MEMORANDUM. 1, 3, 4.

PARLIAMENT—Application to—Injunction to restrain - - - - 671
See RESTRAINING APPLICATION TO PARLIAMENT.

PARTIES—Winding-up petition—Respondents
See WINDING-UP PETITION. 2. [600

PARTITION SUIT—*Decree for Sale—Injury to Property by Tenant in Common—Selling Hay and Turnips off the Land—Injunction.*] After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain a Defendant from destroying or wasting the property. But where, after a decree for sale in a partition suit, a Defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country as between landlord and tenant:—*Held* (reversing the decision of *Stuart*, V.C.), that this was not such a destruction of the property as the Court would restrain, and a motion for an injunction was refused. BAILEY *v.* HOBSON - - 180

2. —— *Reversioner—Practice—Pleading—Acquiring New Title—Amendment.*] A tenant in common in reversion cannot maintain a suit for partition.—If a Plaintiff has no title to maintain his suit at the time when the bill is filed, he

PARTITION SUIT—*continued.*
cannot carry on the suit by subsequently acquiring a title and amending the bill accordingly.—Decree of the Master of the Rolls affirmed. Evans *v.* Bagshaw - - - - 340

3. —— *Legal Title—Action at Law—Hearing of Appeal.*] When the Plaintiff, claiming as a tenant in common at law, has been out of possession for many years, and has not clearly shewn his title, the Court will not decide the question of title in a partition suit, but will leave the Plaintiff to establish his title at law. On an appeal by a Defendant the leading counsel for the Defendant begins; the evidence of the Plaintiff is then read; the evidence of the Defendant is then read; the junior counsel for the Defendant is then heard; the counsel for the Plaintiff are then heard; counsel for the Defendant replies. Giffard *v.* Williams - - - 546

PARTNERSHIP—Accounts—Mode of taking—Share of deceased partner - 687
See Partnership Accounts.

—— Profits left in the business—Interest 519
See Enforcing Agreement for Arbitration. 1.

PARTNERSHIP ACCOUNTS—*Articles—Purchase of Share of deceased Partner.*] Partnership articles provided for a balance-sheet being made out up to the 31st of December in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided that a like account should be made out on the 31st of December next after the death of a partner, and that his executors should be entitled to receive by six instalments from the surviving partners the value of his interest as appearing from such balance-sheet. The uniform practice of the firm in making out their balance-sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In the year 1864 one of the partners died; and, after the balance-sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure since the 31st of December, 1864, of debtors to the firm, and depreciation of consignments, which, when the balance-sheet was made out, had not been realized:—*Held* (reversing the decision of the Registrar), that the executors of the deceased partner were entitled to receive the value of his share as appearing by the balance-sheet without any deduction for the losses subsequently ascertained. *Ex parte* Barber. *In re* Barber - - 687

PAST MEMBERS—*Winding-up—Distribution of Contributions among the Creditors—Companies Act*, 1862, *ss.* 38, 98, 133.] In the winding-up of a limited company the contributions of past members (commonly called Class B) ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors.—The order of *Stuart*, V.C., affirmed. *In re* Accidental and Marine Insurance Corporation. *Ex parte* Briton Medical and General Life Association - - - - - 428

PAST MEMBERS—*continued.*
—— List of - - - - - 63
See Forfeiture of Shares. 1.

PATENT—Infringement—Novelty - 36
See Infringement of Patent.

—— Sealing, objection to—Reference to law officer - - - - 1, 518
See Sealing of Patent. 1, 2.

PAYMENT—In kind—Calls on shares - 346
See Subscriber to Memorandum. 4.

—— Mortgage debt—Payment into Court of Exchequer - - - - 655
See Payment of Mortgage Debt.

—— Mortgage debt—Re-conveyance - 227
See Re-conveyance of Mortgage.

PAYMENT OF MORTGAGE DEBT—*Husband and Wife—Reduction into Possession—Mortgage—Stat.* 7 *Geo.* 2, *c.* 20.] A husband brought an action in the names of himself and wife to recover £200 due on a mortgage made to his wife before her marriage. The mortgagor obtained an order in the action that on payment of the principal and interest into Court the action should be stayed, that a reconveyance should then be executed, and that on its execution the money should be paid out of the Court. An arrangement was made that the wife should receive £100, and the husband the rest, and the mortgagor, on being informed by the Plaintiffs' attorney that the Plaintiffs had settled their differences on those terms, consented to the payment out of Court to the Plaintiffs' attorney. The money was accordingly paid out to the Plaintiffs' attorney; but he, claiming a lien on the £100 for some costs, offered the wife only £83, which she would not receive. The wife survived her husband, and died without having received any part of the money, and without having executed a reconveyance. A suit for foreclosure having been instituted by her executors and devisees:—*Held* (reversing the decision of *Stuart*, V.C.), that, independently of the stat. 7 Geo. 2, c. 20, the mortgagor and his estate were discharged from the debt, inasmuch as the receipt of the attorney of the Plaintiffs in the action was a good discharge. Burton *v.* Williams - 655

PETITION—Trustee Relief Act - - 170
See Trustee Relief Act.

—— Winding-up - - - 363, 600
See Winding-up Petition. 1, 2.

PETITIONING CREDITOR—*Bankruptcy—Petitioning Creditor's Debt—Indorsement of Bill of Exchange after Act of Bankruptcy.*] A drawer of a bill of exchange who has taken it up after an act of bankruptcy committed by the acceptor, but before adjudication, has a debt making him a good petitioning creditor for adjudication against the acceptor on the footing of that act of bankruptcy. *Ex parte* Cyrus. *In re* Broadridge - 176

—— Debt proved in former bankruptcy - 486
See Second Adjudication.

PLEADING—Answer—Insufficiency—Executor's accounts - - - - 573
See Executor's Accounts.

—— Bankruptcy of Plaintiff — Supplemental order—Two suits brought on together
See Power to renew Leases. [193

—— Multifariousness - - - 663
See Power to pledge Assets.

POLICY OF INSURANCE—Granted by persons not truly directors - - - 288
See Directors de facto.

—— Effected by creditor - - 32, 515
See Policy effected by Creditor. 1, 2.

—— Priority of claim for payment - 424
See Priority of Policies.

—— Transfer to another office 118, 381, 632, 640
See Novation of Contract. 1—4.

POLICY EFFECTED BY CREDITOR—*Agent—Debtor and Creditor—Right to Policy.*] An army agent, to whom an officer was largely indebted on the balance of their account, effected in his own name policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest on the balances including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shewn to him, or that he knew that he was in the account charged with the premiums:—*Held* (reversing the decree of *James*, V.C.), that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives. Bruce *v.* Garden - - - - - - 32

2. —— *Annuity—Redemption—Right to Policy.*] On the sale of an annuity for the life of the grantor, it was provided that the grantor would appear at an insurance office for the purpose of having his life insured, and would, if he went beyond the seas, pay any extra premiums which might be occasioned thereby; and it was further provided that the grantor might at any time repurchase the annuity for the sum which was originally paid for it.—The purchaser of the annuity insured the life of the grantor, and paid the premiums on the policy of insurance.—The grantor afterwards repurchased the annuity:—*Held*, that the grantor of the annuity was not entitled to have the policy of insurance assigned to him.—Decree of *Stuart*, V.C., affirmed. Knox *v.* Turner - - - - - 515

POLLUTION OF RIVER—*Nuisance—Pollution—Special Act—Injunction—Delay.*] By the *Leeds Improvement Amendment Act*, 1848, it was provided that the clauses of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34), as to making and maintaining public sewers and the drainage of houses, should be incorporated with and form part of the Act, "except so far as they or any of them are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act;" and by sect. 6 of the Act the Corporation of *Leeds* were authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town, and to convey the same into the river *Aire*:—*Held*, that the power to drain into the river was controlled by sect. 24 of the *Towns Improvement Clauses Act*, and also by sect. 107, though that clause was not expressly incorporated in the local Act; and that the corporation were not authorized by sect. 6 of the local Act to create a nuisance by draining into the river:—*Held*, that though the river *Aire* was polluted before it received the drainage of *Leeds*, the landowners on the banks were entitled to restrain the further pollution:—*Held*, that though the sewer had been completed, and in operation sixteen years before proceedings were taken, the Court would interfere at the suit of the landowners.—Decree of *James*, V.C., affirmed. Attorney-General *v.* Leeds Corporation 583

POWER—Appointment by general bequest 26
See Appointment by general Bequest.

—— Appointment—Fraudulent appointment 40, 203
See Fraudulent Appointment. 1, 2.

—— Executors—Pledging assets—Preference of one creditor - - - - 663
See Power to pledge Assets.

—— Extinction of - - - - 193
See Power to renew Lease.

—— Renewing Leases - - - 193
See Power to renew Leases.

POWER TO PLEDGE ASSETS—*Executor—Preference of One Creditor—Delegation of Power to collect Assets—Multifariousness.*] An executrix assigned all the book-debts of her testator, which formed the bulk of his property, together with all the books of account, to one of the creditors, to secure the payment of his debt; and gave him a power of attorney to collect the debts in her name. The estate proved insolvent:—*Held* (reversing the decree of *Malins*, V.C.), that the assignment was valid.—*Semble*, that a suit praying for the administration of the estate, and to set aside the assignment as invalid, was not multifarious, and that the creditor was properly made a party. Earl Vane *v.* Rigden - - 663

POWER TO RENEW LEASES—*Right of Donee of the Power to keep the Fines—Effect of Alienation or Bankruptcy on the Power—Pleading—Supplemental Order—Bankruptcy of the Plaintiff—Conduct of Trustee.*] The Plaintiff executed a post-nuptial settlement whereby he conveyed certain freehold hereditaments, the legal estate in which was outstanding, to a trustee upon trust to pay the rents, issues, and profits to the Plaintiff's wife during her life, and after her death to the Plaintiff during his life, and after the death of the survivor for the benefit of their children. The settlement contained a power to the Plaintiff during his life, and after his death to the wife during her life, and after the death of the survivor to the trustee, to renew leases for lives, and take fines on renewals, but so that the usual rents were still reserved. And it was declared that the trustee should hold all fines which he might take in trust for the child or children who should be then entitled to the inheritance of the premises. The Plaintiff subsequently assigned his interest under the settlement to *B.* by way of mortgage.—The trustee of the settlement disputed the right of the Plaintiff to take the fines for his own benefit, claiming them on behalf of the wife. The Plaintiff accordingly filed a bill against the trustee and *B.*, praying that he might be declared entitled to take the fines on renewals of leases for his own benefit.—After the filing of the bill the Plaintiff became bankrupt, and his assignee obtained a supplemental order to carry on the

POWER TO RENEW LEASES—*continued.*
suit. The cause came on to be heard in the form of two suits, one by the original Plaintiff against the original Defendants, and the other by his assignee against the original Defendants:—*Held*, first, that on the construction of the settlement the Plaintiff was entitled to take the fines on renewals for his own benefit:—Secondly: That inasmuch as the legal estate was outstanding and beyond the Plaintiff's control, and the trustee had interfered with his power of granting leases, he was entitled to bring a suit in equity for declaration of his rights:—Thirdly: That the power of granting renewed leases was not extinguished or suspended either by the assignment of the Plaintiff's interest by way of mortgage or by his bankruptcy, but that such power might be still exercised by him with the concurrence of the mortgagee and assignee. Decision of *James*, V.C., reversed.—*Semble*, the defect in the suit caused by the bankruptcy of the Plaintiff was properly cured by the supplemental order, as the two suits were brought on together.—The trustee, having acted as a partizan of the wife against the husband, and refused information to those who wished for renewals of leases, was refused his costs. Simpson *v.* Bathurst. Shepherd *v.* Bathurst [193

PRACTICE—Amendment by adding Plaintiff 548
See Amendment by adding Parties.

—— Appeal—Course of proceeding on hearing
See Partition Suit. 3. [546

—— Appeal from order in chambers - 88
See Interest in Winding-up. 2.

—— Bankruptcy—Appeal - 470, 473, 482
See Bankruptcy Appeal. 1, 2, 3.

—— Bankruptcy—Staying proceedings - 743
See Staying Proceedings in Bankruptcy.

—— Concurrent suits—Transfer of cause - 467
See Concurrent Suits.

—— Issue at law, when granted—Sir J. Rolt's Act - - - - - - 459
See Issue at Law.

—— Next friend—Appeal - - - 274
See Next Friend.

—— Process to enforce order—Service - 323
See Process to enforce Order.

—— Production of documents - 495, 497
See Production of Documents. 1, 2.

—— Receiver, choice of—Appeal—Winding-up
See Receiver. [420

—— Staying proceedings - - 453, 720
See Staying Proceedings. 1, 2.

—— Supplemental order—Two suits brought on together - - - - - 193
See Power to renew Leases.

—— Transfer of cause—Concurrent suits 467
See Concurrent Suits.

—— Trustee Act, 1850 - - 72, 662, 698
See Trustee Act, 1850. 1, 2, 3.

—— Withdrawal of appeal—Costs - 116
See Withdrawal of Appeal.

PREFERENCE OF ONE CREDITOR—Executor
See Power to pledge Assets. [663

PRESUMPTION — Death — Absence for seven years - - - - 139
See Presumption of Death.

PRESUMPTION OF DEATH—*Person not heard of for Seven Years—Onus probandi.*] If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards.—A testator died on the 5th of January, 1861, having bequeathed his residuary estate equally between his nephews and nieces. One of his nephews, *N.*, was born in 1829, had gone to *America* in 1853, had frequently written home till August, 1858, when he wrote from on board an American ship of war, but from that time no letter had been received from him, and nothing was afterwards heard about him, except that he was entered in the books of the American Navy as having deserted on the 16th of June, 1860, while on leave:—*Held* (reversing the decision of *James*, V.C.), that his personal representative had not established a title to any share of the testator's estate, and that it must be divided among the nephews and nieces who were proved to have survived the testator.—*Thomas* v. *Thomas* (2 Dr. & Sm. 298), and *In re Benham's Trusts* (Law Rep. 4 Eq. 416) overruled. *In re* Phené's Trusts - - - - 139

PRIORITY—Policies of insurance - - 424
See Priority of Policies.

PRIORITY OF POLICIES—*Payment out of Property — Creditors' Representative — Costs.*] The policies of a life assurance company provided that the funds and property of the company, "after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds and property," should alone be liable for payment of the sum assured, and that no member of the company should be liable for it beyond the amount unpaid on his shares. An order having been made for winding up the company:—*Held* (affirming the decision of *Malins*, V.C.), that a sum which had become payable on a policy before the commencement of the winding-up, but had not been paid, had no priority over the claims of policy-holders the moneys assured by whose policies had not become payable.—The costs of the appearance of a creditors' representative will not be allowed, except in special cases. *In re* International Life Assurance Society. McIver's Claim - - - - 424

PRIVILEGE OF PARLIAMENT—*Bankruptcy Act, 1861, s. 69—Bankruptcy — Non-trader having Privilege of Parliament.*] A non-trader having privilege of Parliament is not exempted from the operation of the *Bankruptcy Act*, 1861. *Ex parte* Morris. *In re* Duke of Newcastle - 172

PRIVILEGED COMMUNICATION — *Bankruptcy Act, 1861, s. 216—Examination of Witness.*] A

PRIVILEGED COMMUNICATION—*continued.* witness who was being examined under the *Bankruptcy Act*, 1861, s. 216, was asked where the bankrupt's father was residing. The witness, who was the father's solicitor, declined to answer, and stated that "the place of residence of my said client came to my knowledge in my professional capacity, and in the course and in consequence of the professional employment in which I was engaged on his behalf, and in no other way":—*Held* (affirming the decision of the Registrar), that the witness had not made a case for excusing himself from answering on the ground of professional privilege:—*Held*, also, on the authority of *Ex parte Vogel* (2 B. & A. 219), decided under 5 Geo. 2, c. 30, s. 16, that the question was one which was authorized by the Act.—Where a clause in an Act of Parliament which has received a judicial interpretation is re-enacted in the same terms, the Legislature is to be deemed to have adopted that interpretation. *Ex parte* Campbell. *In re* Cathcart - 703

PROCESS TO ENFORCE ORDER—*Cons. Ord. xxix., Rule 6—Writ of Fi. Fa.—Service of Order.*] Service of a decree or order directing payment of money or costs is not requisite as a preliminary to issuing a writ of *fi. fa.* under Cons. Ord. xxix., rule 6.—Where an order for payment of a sum of money is made against several persons, process can be issued separately against one of them, though the order is not in terms joint and several.—The decision of the Master of the Rolls affirmed. Land Credit Company of Ireland *v.* Lord Fermoy. *Ex parte* Munster - - 323

PRODUCTION OF DOCUMENTS—*Practice—Affidavit as to Documents—Sufficiency—Joint Ownership.*] Where a party to a suit is required to make an affidavit as to documents in his possession, and alleges in his affidavit as a reason for not producing them that they are in the possession of himself and a third person as joint owners, he is bound to state the nature of the joint ownership.—Order of the Master of the Rolls affirmed. Bovill *v.* Cowan - - 495

2. —— *Production of Deed by Mortgagee—Inspection of Part of a Deed—Exceptions.*] By a deed of settlement a general power of appointment over certain estates was reserved to the settlors, subject to which, the estates were limited to the settlors for their lives, with remainders to other persons in strict settlement. The settlors executed their power of appointment by mortgaging the estates:—*Held*, that the mortgagees could not, in a suit for redemption brought by one of the remaindermen, be ordered to produce the deed of settlement, or to give any discovery as to it.—Orders of *James*, V.C., discharged. Chichester *v.* Marquis of Donegall - - 497

PROOF BY MORTGAGEE—*Company—Winding-up—Secured Creditor—Proof by Mortgagee after Contract for Sale of mortgaged Property—Form of Order.*] Mortgagees of real estate of a limited company which had been ordered to be wound up contracted to sell part of their security under their power of sale. The deposit was paid, but the contract was not completed. The mortgagees then claimed to prove in the winding-up for the whole amount of their debt and costs. Afterwards they made a fresh contract for the sale of the property, the deposit being retained as part of the new purchase-money. It being uncertain whether the contract would ever be completed and the rest of the purchase-money paid, the Court made an order that the proof should be admitted for the whole amount of the debt less the amount of the purchase money mentioned in the contract, without prejudice to the right of either party to increase or diminish the proof, and to the right of the mortgagees for further proof in respect of costs, charges, and expenses.—The decision of *James*, V.C., affirmed. *In re* Oxford and Canterbury Hall Company - - - 433

PROSPECTIVE COMMISSION—*Winding-up—Insurance Company—Proof by Agent for prospective Commission.*] A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10 per cent. on all business transacted. Before the five years were expired the company was wound up voluntarily:—*Held* (affirming the decision of the Master of the Rolls), that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years. *In re* English and Scottish Marine Insurance Company. *Ex parte* Maclure - - - - [737

PURCHASE-MONEY—Lien for—Railway company - - - - - 414
See Vendor's Lien against Railway Company.

RAILWAY COMPANY—First-class station—Specific performance - - 525
See First-class Station.

—— Notice to treat—Old notice - - 751
See Notice to Treat.

—— Scheme of arrangement - - - 67
See Scheme of Arrangement.

—— Vendor's lien against - - - 414
See Vendor's Lien against Railway Company.

RECEIVER—*Practice—Appeal from Choice of—Liquidator.*] An order having been made for continuing under supervision the voluntary winding-up of a company, under which a liquidator had been appointed, an equitable mortgagee of property of the company filed a bill to enforce his security, and obtained an order for a receiver. The company proposed the liquidator as receiver, but the Judge in Chambers appointed another person, who had been proposed by the Plaintiff:—*Held*, on appeal, that the liquidator, inasmuch as no personal objection was alleged against him, ought to have been appointed receiver, since the appointment of another person would cause great and unnecessary expense; and that this was a matter of principle, so that an appeal from the appointment by the Judge would be entertained.—Decision of *Stuart*, V.C., reversed. Perry *v.* Oriental Hotels Company - - 420

—— Railway company—Vendor's lien - 414
See Vendor's Lien against Railway Company.

RECONVEYANCE BY MORTGAGEE — *Payment.*] A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase a part of the mortgaged estate, and has not accepted the title.—On tender by a person having a partial interest giving a right to redeem the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested.—Decree of the Master of the Rolls varied. Pearce *v.* Morris - - 227

RATIFICATION—Infant after attaining majority
See Infant Transferee. 2. [302

RECTIFICATION — Register of shareholders—Power of liquidator to rectify - 559
See Transfer of Shares.

—— Register of shareholders—"Without sufficient cause"—Form of summons 95
See Rectification of Register.

RECTIFICATION OF REGISTER — *Companies Act*, 1862, *s.* 35—*Winding-up—Transfer to avoid Liability — False Recitals — Practice — Costs—Form of Summons to rectify Register.*] *K.*, a shareholder in a company which was in difficulties, but whose shares had still a market price, transferred them to *L.* by a deed, in consideration of a sum expressed to be paid by *L.*, being about the market price. No sum was, in fact, paid, nor had there been any contract of sale, *K.* having brought the transfer to *L.*, and asked him to execute it, saying it was a transfer of shares to him, but saying nothing more. *L.* was a ship's steward, whose wages were £1 a week. The transfer was duly registered, the directors, who had a power of declining to receive any transfer, not objecting, and *L.* was entered on the register. A few weeks afterwards an order was made to wind up the company. The official liquidator having applied to rectify the register by restoring the name of *K.*:—*Held* (affirming the decision of *Stuart*, V.C.), that the Court had jurisdiction to set the matter right under the *Companies Act*, 1862, s. 35, for that the name of any person improperly entered or omitted must be considered to be entered or omitted "without sufficient cause:"—*Held*, also, that as this was part of the proceedings in the winding-up, the Court had jurisdiction to order *K.* to pay costs. Whether in the case of a going concern costs could have been given against *K.*, *quære*:—*Held*, also, that the application ought to have been in the name, not of the liquidator, but of the company, and that the summons must be amended accordingly.—*In re* Bank of Hindustan, China, and Japan. *Ex parte* Kintrea - - - - - 95

REDUCTION INTO POSSESSION—Wife's mortgage - - - - - - 655
See Payment of Mortgage Debt.

REDUCTION OF CAPITAL AND SHARES—*Companies Act*, 1867—*Reduction of Capital—Discontinuance of the Use of the Words "and reduced."*] The expiration of three months from the date of the final order is a proper period for discontinuing the addition of the words "and reduced" to the title of a company whose capital is reduced under the *Companies Act*, 1867. — Order of *Stuart*, V.C., varied. *In re* Estate Company, Limited and Reduced - - - 407

REGISTER—Rectification of - 95, 559
See Rectification of Register. 1, 2.

REGISTRAR IN BANKRUPTCY—Power to tax costs - - - - - 482
See Taxation of Costs. 1.

REGISTRATION—Creditors' deed—Annulling
See Annulling Registration. [326

RELEASE OF SHAREHOLDER—*Ultrà vires* act [707
See Subscriber of Memorandum. 5.

REMOTENESS — Class — Children and grandchildren - - - - 713
See Gift, original or substitutional. 2.

RENEWABLE LEASEHOLDS—*Enfranchisement—Trustees—Consent of Court—Ecclesiastical Commissioners*—23 & 24 *Vict. c.* 124—*Power to Purchase—Corporation Aggregate.*] A testatrix bequeathed leaseholds held under a dean and chapter to trustees on trust for a tenant for life, with remainders over, and with power to raise money for renewing the leases. The property became vested in the Ecclesiastical Commissioners, with whom the trustees of the will agreed for the purchase of the reversion in part of the leaseholds, in consideration of the surrender of the other part, and the payment of a sum of money. The estate of the testatrix was administered by the Court, and the agreement was made subject to the approval of the Court:—*Held* (affirming the decision of the Master of the Rolls, that the Court would not approve of the agreement against the wish of the tenant for life, if his income would be considerably reduced by the purchase.—Trustees with power to renew, have power to purchase the reversion in leaseholds, under 23 & 24 Vict. c. 124; and that Act applies to the estates of corporations, both aggregate and sole. Hayward *v.* Pile - - - 214

RENT—Occupation — Allowance for — Purchase by railway company - - 717
See Occupation Rent.

RESPONDENTS TO PETITION—Persons collaterally interested - - - 600
See Winding-up Petition. 2.

RESTRAINING APPLICATION TO PARLIAMENT — *Injunction — Jurisdiction.*] Although there is no doubt that the Court of Chancery, by virtue of its jurisdiction *in personam*, has power to restrain an improper application to Parliament for a private Act, yet it is difficult to conceive a case in which it would be right for the Court to exercise that power.—Injunction restraining directors from promoting a bill discharged. *In re* London, Chatham, and Dover Railway Arrangement Act. *Ex parte* Hartridge and Allender - - - - - - 671

RESTRAINING ULTRÀ VIRES ACT—*Company—Injunction—Locus standi of Plaintiff—Simple Contract Creditor—Equitable Shareholder—Averments of Illegality—Recouping Revenue out of Capital.*] A simple contract creditor of a company cannot sustain a bill to restrain the company

RESTRAINING ULTRÀ VIRES ACT—*continued.*
from dealing with their assets as they please on the ground that they are diminishing the fund for payment of his debt.—A shareholder in a company who seeks to restrain the company from doing an *ultrà vires* act must shew, by distinct and definite averments, the illegality of the act.—Whether persons having an equitable interest in shares, but not being registered shareholders, can file a bill to restrain a company from doing an *ultrà vires* act, *quære.*—Where a company have paid for things properly chargeable to capital out of revenue, they are justified in recouping the revenue account at a subsequent time out of capital; and may, if necessary, raise fresh capital under their borrowing powers for that purpose.—Decision of *Stuart,* V.C., reversed. MILLS *v.* NORTHERN RAILWAY OF BUENOS AYRES COMPANY [621

RETROSPECTIVE EFFECT—Decree of Court 112
See INTEREST IN WINDING-UP. 3.

REVERSION—Partition suit - - 340
See PARTITION SUIT. 2.

RIGHT TO NAME OF FIRM—*Injunction—Colourable Variation—Assumption of Name of Firm—Misconduct of Plaintiff seeking Injunction—Delay.*] The Plaintiffs had carried on for some years at No. 22, *Pall Mall*, under the style of "*The Guinea Coal Company,*" a large business, which had a considerable reputation. In March, 1869, the Defendant, who had been their manager, set up a rival business in *Beaufort Buildings, Strand,* under the name of "*The Pall Mall Guinea Coal Company,*" and at the end of August removed it to No. 46, *Pall Mall.* On the 24th of November, the Plaintiffs, finding that many persons had been misled into giving orders to the Defendant in the belief that his concern was that of the Plaintiffs, filed their bill to restrain him from trading under the above style, or any other colourable imitation of the Plaintiffs' business style. The Defendant, among other grounds of defence, alleged that the Plaintiffs had knowingly and habitually sold short weight, and that they had no exclusive right to the name "*Guinea Coal Company,*" which was used by various other establishments about *London.* Vice-Chancellor *Malins* granted an injunction restraining the Defendant from using the name "*The Pall Mall Guinea Coal Company*" in *Pall Mall.* On appeal motion by the Defendant:—*Held,* that although the Plaintiffs had no exclusive right to the name, the injunction had been properly granted, on the ground that the Defendant had no right to use the name in such a way as to lead persons to believe that his business was that of the Plaintiffs, and that therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used:—*Held,* that there had been no such delay as to take away the Plaintiffs' right to an injunction on interlocutory application; for that in such cases a Plaintiff is not bound to come to the Court until he has had time to obtain evidence that persons have been actually misled by the acts complained of, and that the delay, even if unexplained, would not have been fatal to the Plaintiffs' case, as the injunction asked for was of such a nature that the Defendant could not be injured by the delay in asking for it:—*Held,* that if it had been proved that the Plaintiffs intentionally and habitually sold short weight the Court would have refused their application for an injunction. LEE *v.* HALEY - 155

RIVER—Pollution of - - - - 583
See POLLUTION OF RIVER.

ROLT'S ACT (25 & 26 Vict. c. 42)—Issue when granted - - - - 459
See ISSUE AT LAW.

SALE BY COURT—*Vendor and Purchaser—Setting aside Purchase—Fiduciary Position—Solicitor—Particulars*—30 & 31 *Vict. c.* 48, *s.* 7.] Property sold in a foreclosure suit was purchased by *W.*, a solicitor, whose name appeared on the particulars of sale as one of several solicitors from whom particulars of sale could be obtained. He was not solicitor to any of the parties to the suit, but was solicitor to some creditors of the mortgagee, one of whom had obtained a decree for administration of the mortgagee's estate. *W.* had two days before the sale taken out a summons to obtain leave for the Plaintiff in the administration suit to attend proceedings in the foreclosure suit, such summons being returnable on the day after the sale. He had never been consulted about the sale, and did not know what was the amount of the reserved bidding:—*Held* (reversing the decision of the Master of the Rolls), that *W.* was not disqualified from purchasing, for that his client was at liberty to purchase, and therefore his being her solicitor did not disqualify him, and that the mere fact of his own name appearing on the particulars of sale as a person from whom copies of them might be obtained was not a disqualification:—*Held,* that if *W.* had stood in such a fiduciary position as to be disqualified from purchasing, the statute 30 & 31 Vict. c. 48, s. 7, would not have been a bar to setting aside the purchase, though absolutely confirmed. GUEST *v.* SMYTHE - - - - 551

SALE BY HUSBAND AND WIFE—*Vendor and Purchaser—Abatement in Price.*] Where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey:—*Held,* that the purchaser could not compel the husband to convey his interest and accept an abated price. CASTLE *v.* WILKINSON - - - - - 534

SCHEME OF ARRANGEMENT—*Jurisdiction—Railway Companies Act,* 1867 (30 & 31 *Vict. c.* 127), *ss.* 7, 9—*Restraining Execution by Debenture Holder.*] The 7th and 9th sections of the *Railway Companies Act,* 1867, give only an interim power to the Court with respect to proceedings by creditors between the filing and the inrolment of a scheme of arrangement. After the inrolment the company cannot obtain an injunction either against outside creditors or creditors bound by the scheme, except upon a bill filed.—A debenture holder obtained judgment at law before the passing of the *Railway Companies Act,* 1867, and issued execution after the inrolment of a scheme of arrangement under the Act by

SCHEME OF ARRANGEMENT—*continued.*
which all debenture holders were bound. The creditor moved for leave under the 9th section to levy execution, and the company moved under the 7th section to restrain him and the sheriffs from further proceedings. Both motions were dismissed with costs. But *semble*, the creditor was bound by the scheme, notwithstanding his judgment, and if a bill had been filed he would have been restrained. — The order of *Malins*, V.C., varied.—*Bowen* v. *Brecon Railway Company* (Law Rep. 3 Eq. 541) questioned. *In re* Potteries, Shrewsbury, and North Wales Railway Company - - - - - - - 67

SCRIPHOLDER—Infant transferee - - 614
See Infant Transferee. 3.

SEALING OF PATENT — *Similar Invention — Practice — Reference to Law Officer.*] Where the sealing of a patent is objected to on the ground that the invention is a colourable imitation of one which is the subject of an existing patent, a reference will be made to the Law Officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for. *Ex parte* Yates - - - - - 1

2. —— *Similar Invention — Practice — Reference to Law Officer—Costs.*] When the sealing of a patent is opposed on the ground that the invention is similar to one which is the subject of an existing patent, a reference will be made to the Law Officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for; the opponent paying the costs of the hearing, unless there has been fraud on the part of the applicant. *Ex parte* Manceaux - — - - - 518

SECOND ADJUDICATION —*Bankruptcy — Second Adjudication to impeach former fraudulent Bankruptcy—Petitioning Creditor's Debt—Debt proved in former Bankruptcy — Practice — Transfer of pending Proceedings to London—Bankruptcy Act,* 1869, *s.* 80.] A debtor was adjudicated bankrupt on his own petition, in December, 1869, in a County Court. A creditor who had proved under the bankruptcy filed a fresh petition for adjudication in January, 1870, in the Court of *London*, for the purpose of impeaching the first bankruptcy, under which the debtor was a second time adjudicated bankrupt; and the Chief Judge made an order transferring the proceedings in the first bankruptcy from the County Court to *London*:—*Held* (affirming the orders of *Bacon*, C.J.), first, that the creditor's debt was sufficient to support the petition for adjudication, notwithstanding it had been proved in the former bankruptcy:—Secondly, that the Chief Judge had power under the 80th section of the *Bankruptcy Act*, 1869, to transfer to the Court of *London* the proceedings in the pending bankruptcy, although they had been commenced under the Act of 1861. *Ex parte* Wieland. *In re* Wieland - - - 486

SECURITIES FOR BILLS OF EXCHANGE—*Appropriation — Representations.*] The Plaintiffs purchased from the *New Orleans Bank* a bill of exchange drawn on the *Bank of Liverpool*. The manager of the *New Orleans Bank*, at the time, told the Plaintiffs that there was, or would be at the maturity of the bill, a balance at the *Bank of Liverpool* more than sufficient to meet the bill, and that there was no doubt it would be paid. The course of dealing between the *New Orleans Bank* and the *Liverpool Bank* was that the former drew bills on the latter, and employed them also to collect the moneys receivable on bills remitted to them, the agreement being that the *Liverpool Bank* was never to be under cash advances, and the funds remitted had always been sufficient to meet its acceptances. Soon after the purchase, the *New Orleans Bank* suspended payment, and the *Liverpool Bank* refused to accept the bill. The funds in the hands of the *Liverpool Bank* were abundantly sufficient to meet all their acceptances for the *New Orleans Bank*, and also to pay this bill:—*Held* (reversing the decision of *Stuart*, V.C.), that the statements of the manager were merely a correct statement of the course of business between the two banks, and did not give the purchaser of the bill any lien on the funds in the hands of the *Liverpool Bank.*—*Per James*, L.J.:—If what was said by the manager had amounted to a contract to charge the funds, the clearest proof would have been necessary that he had authority to make such a contract. Thomson *v.* Simpson - - - - 659

2. —— *Acceptances —Insolvents — Mortgage—Doctrine of Ex parte Waring* (19 Ves. 345).] *K. & Co.* accepted bills for *L. & Co.*, and *L. & Co.* mortgaged to *K. & Co.* an estate in *Guiana* to secure a cash credit, granted by *K. & Co.*, to the extent of 75,000 dollars. There was a general current account between the two firms. *K. & Co.* and *L. & Co.* each became insolvent:—*Held*, that, under the circumstances, the mortgage was a security for money advanced to meet the bills: and *held*, that the holders of the bills were entitled to the benefit of the mortgage securities, and to have the money received from the mortgage security applied in payment of the bills. Decree of *Stuart*, V.C., reversed. City Bank *v.* Luckie - 773

SECURITY — Bankruptcy — Debtor summons — Bond—Staying proceedings - 741
See Debtor Summons. 1.

SEIZURE QUOUSQUE—Copyholds - - 531
See Limitations, Statute of. 2.

SEPARATE ESTATE—Liability of - - 274
See Next Friend.

SEPARATION—Agreement for - - 336
See Agreement for Separation.

SERVICE—Enforcing Order of Court of Chancery
See Process to enforce Order. [323

SET-OFF—Winding-up—Bankrupt shareholder
See Set-off in Winding-up. [492

SET-OFF IN WINDING-UP—*Company—Winding-up — Bankrupt Shareholder — Creditors' Deed — Set-off—Assignee of Debt—Bankrupt Law Consolidation Act,* 1849, *s.* 171—*Companies Act,* 1862, *s.* 101—*Balance Order.*] Where a contributory, who is also a creditor of a company which is being wound up, becomes bankrupt or executes a creditors' deed under the *Bankruptcy Act*, 1861, after the commencement of the winding-up, the debt must be set off against the calls, whether the claim be made in the bankruptcy or in the winding-up. And if the contributory had before his bankruptcy

SET-OFF IN WINDING-UP—*continued.* assigned his debt to a third party, the assignee will stand in the same position as the contributory would have done as to the right of set-off. The decision of *Stuart*, V.C., reversed. *In re* Universal Banking Corporation. *Ex parte* Strang - - - - - - 492

SETTLEMENT—Statute of Limitations—Non-investment of funds - - 74
See Limitations, Statute of. 1.

—— Voluntary - - - - - 538
See Fraudulent Conveyance. 1.

SHARES—Transferable by delivery - 363
See Winding-up Petition. 1.

SHAREHOLDER—Restraining *ultrà vires* act—Allegations of illegality - - 621
See Restraining ultrà vires Act.

SIMILAR INVENTION—Patent—Reference to Law Officer - - - 1, 518
See Sealing of Patent. 1, 2.

SOLICITOR—Authority to pledge his client's credit—Counsel's fee - - 457
See Counsel's Fees.

—— Order *ex parte* against - - - 16
See Ex parte Order.

—— Purchase by, under sale by the Court 551
See Sale by the Court.

—— Taxation—Amending bill after delivery 694
See Taxation of Costs. 2.

SPECIFIC PERFORMANCE—Agreement for separation - - - - 336
See Agreement for Separation.

—— Arbitration - - - 519, 648
See Enforcing Agreement for Arbitration. 1, 2.

—— Assignment of contract - - 604
See Sub-Contract.

—— Husband and wife—Refusal of wife to convey - - - - - 534
See Sale by Husband and Wife.

—— Occupation rent—Purchase by railway company - - - - 713
See Occupation Rent.

—— Railway company—First-class station 525
See First-class Station.

—— Valuation of furniture - - - 648
See Enforcing Agreement for Arbitration. 2.

SPECIFICATION OF PATENT—Novelty - 36
See Infringement of Patent.

STATUTES:

13 Eliz. c. 5—*Fraudulent Conveyances* 588, 577
See Fraudulent Conveyance. 1, 2.

5 Geo. 2, c. 30—*Bankruptcy* - - 703
See Privileged Communication.

7 Geo. 2, c. 20—*Mortgage* - - 655
See Payment of Mortgage Debt.

3 & 4 Will. 4, c. 27—*Limitations* [74, 233, 531
See Limitations, Statute of. 1—3.

6 & 7 Will. 4, c. 32—*Building Societies* 4
See Building Society. 1.

6 & 7 Vict. c. 73, s. 37—*Attornies* - 482
See Taxation of Costs. 1.

STATUTES—*continued.*

8 Vict. c. 18, s. 124—*Lands Clauses* - 751
See Notice to Treat.

10 & 11 Vict. c. 34, ss. 24, 107—*Towns Improvement Clauses* - - - 583
See Pollution of River.

12 & 13 Vict. c. 106, s. 171—*Bankruptcy* 492
See Set-off in Winding-up.

23 & 24 Vict. c. 124—*Ecclesiastical Commissioners* - - - - 214
See Renewable Leaseholds.

24 & 25 Vict. c. 134, s. 69—*Bankruptcy* 172
See Privilege of Parliament.

—— —— s. 159 - - - - 13
See Debt without Expectation of Payment.

25 & 26 Vict. c. 42—*Rolt's Act* - - 459
See Issue at Law.

—— c. 89, s. 35—*Companies* - - 95
See Rectification of Register.

—— —— s. 38 - - - - 63
See Forfeiture of Shares. 1.

—— —— ss. 38, 98, 133 - - 428
See Past Member.

—— —— s. 101 - - - - 492
See Set-off in Winding-up.

—— —— s. 122 - - - - 93
See Irish Winding-up.

—— —— s. 153 - - - - 567
See Dispositions before Winding-up Order.

30 & 31 Vict. c. 48, s. 7—*Sales by Auction*
See Sale by Court. [551

—— c. 127, ss. 7, 9—*Railway Companies* - - - - 67
See Scheme of Arrangement.

—— c. 131, s. 10—*Companies* - - 407
See Reduction of Capital and Shares.

32 & 33 Vict. c. 71, s. 6—*Bankruptcy* - 779
See Debtor Summons. 2.

—— —— s. 9 - - - - 741
See Debtor Summons. 1.

—— —— ss. 13, 65, 66 - - - 473
See Injunction in Bankruptcy.

—— —— ss. 71, 72 - 470, 473, 482
See Bankruptcy Appeal. 1—3.

—— —— s. 80 - - - - 486
See Second Adjudication.

—— —— s. 80 - - - - 743
See Staying Proceedings in Bankruptcy.

—— —— ss. 71, 130 - - - 470
See Bankruptcy Appeal. 1.

—— —— ss. 125, 126 - - - 722
See Majority of Creditors.

—— c. 83, s. 20—*Bankruptcy Repeal* - 470
See Bankruptcy Appeal.

STAYING PROCEEDINGS—*Practice*—*Appeal—Costs of the Application.*] The costs of an application to stay the execution of a decree pending an appeal are in the discretion of the Court. The proper rule is, that they should ordinarily abide the result of the appeal. A decree was made that accounts should be taken, and that

STAYING PROCEEDINGS—*continued.*
the Defendants should pay what should be found due to the Plaintiffs, and also the costs of the suit. The Defendants moved to stay the execution of the decree pending an appeal to the House of Lords, on the ground that the Plaintiffs were out of the jurisdiction. The Court refused to stay the taking of the accounts or the taxation of the costs, and directed that the costs, when taxed, should be paid to the Plaintiffs' solicitor on his giving satisfactory security for their repayment in case of a reversal of the decree; but the Plaintiffs not being able to give security for the repayment of the money due to them, it was ordered that the amount should be paid into Court, the Defendants undertaking to abide by such order as might be made as to interest; the costs to abide the result of the appeal.—*Earl of Shrewsbury* v. *Trappes* (2 D. F. & J. 172), *Topham* v. *Duke of Portland* (1 D. J. & S. 603), and *Walford* v. *Walford* (Law Rep. 3 Ch. 812), discussed. BURDICK *v.* GARRICK - - - 453

2. —— *Practice—Appeal—Money in Court.*] The holder of a policy of life assurance filed a bill against the company to recover the amount insured. The Master of the Rolls decided in favour of the Plaintiff, but ordered the money to be paid into Court, pending an appeal by the Defendants. The Court of Appeal in Chancery reversed the decree, and dismissed the bill with costs. The Plaintiff then appealed to the House of Lords.—The Court refused to order the money to be retained in Court pending the appeal. ATHERTON *v.* BRITISH NATION ASSURANCE COMPANY - - - - - - - 720

STAYING PROCEEDINGS IN BANKRUPTCY—*Debtor Summons—Liquidation by Arrangement—Injunction.*] In July, 1869, *D.* recovered judgment against *W.*, and in March, 1870, served him with a debtor summons, to which *W.* did not appear. On the 6th of July, 1870, *D.* filed a Petition for adjudication against *W.*, which was to be heard on the 16th. On the 16th of July *W.* filed a Petition for liquidation by arrangement and on the same day obtained an injunction staying the proceedings in bankruptcy till the 23rd. On the 23rd this injunction was renewed till the 6th of August, the first meeting of creditors under the liquidation proceedings being fixed for the 4th of August. There was no evidence that any of the creditors preferred liquidation to bankruptcy:—*Held*, that the injunction ought not to have been granted. *Ex parte* DIMOND. *In re* WILLIAMS - - 743

SUB-CONTRACT—*Assignee of Contract—Notice.*] A vendor of land may receive the balance of the purchase-money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract.—A vendor agreed to sell leaseholds which were under a heavy rent, and received part of the purchase-money. The purchaser afterwards agreed to assign to a bank, if required, the contract for the purchase by way of security for money advanced, and the bank gave notice of this agreement to the vendor. The bank afterwards refused to advance to the purchaser the money required to complete, but this was not known to the vendor. The purchaser, after the time fixed for completion, paid the balance of the purchase-money, the vendor executed an assignment, and the purchaser assigned to an assignee without notice of the security to the bank:—*Held*, that the vendor was entitled to complete without giving notice to the bank, and that the bank had no remedy against him.—Decree of the Master of the Rolls reversed. M'CREIGHT *v.* FOSTER - - - 604

SUBSCRIBER OF MEMORANDUM—*Company—Allotment of paid-up Shares.*] *P.* subscribed the memorandum of association of a company for 1350 shares. By the articles it was stated that the company would issue 1500 shares to *P.*, which were to be credited as fully paid-up shares, and that *P.* would accept them as the purchase-money of the goodwill and stock-in-trade of a business which *P.* had sold to the company. 1350 fully paid-up shares were allotted to *P.*, and 150 to his nominees. No money was paid for the shares. The company was afterwards wound up:—*Held* (reversing the decision of the Master of the Rolls), that *P.* was not liable as a contributory. *In re* HEYFORD COMPANY. PELL'S CASE - - - - - - - 11

2. —— *Company—Contributory—Surrender of Shares before Entry on Register—Companies Act, 1862, s. 23.*] Where the directors of a company have power to accept the surrender of shares, they may accept the surrender of the shares of a subscriber of the memorandum of association whose name has not been entered on the share register pursuant to the 23rd section of the *Companies Act*, 1862.—*S.*, a subscriber of the memorandum of association of a company, who was also a director, applied for the number of shares for which he had subscribed, and paid the deposit on them. Before any shares had been allotted to him, or his name had been entered on the share register, he withdrew from the office of director, and applied to have his application for shares cancelled. The directors, who had power under the articles to accept the surrender of shares, cancelled the application and returned the deposit. The company was afterwards wound up:—*Held* (reversing the decision of the Master of the Rolls), that the surrender of the shares was valid, and that *S.* was not a contributory. *In re* NATAL INVESTMENT COMPANY. SNELL'S CASE - - - 22

3. —— *Company—Winding-up—Contributory—Paid-up Shares.*] A person who subscribes the memorandum of association of a company for a certain number of shares is bound to take that number of shares from the company, and pay for them either in money or money's worth.—*P.* signed the memorandum of association of a company for 1350 shares, and *F.* and *J.* for 50 shares each. *P.* sold a business to the company, part of the price of which was to be paid by 1500 paid-up shares. By his direction 50 of these paid-up shares were allotted to *F.*, and 50 to *J.*:—*Held*, that the obligation into which *F.* and *J.* had entered by subscribing the memorandum was not thus satisfied: and that each was a contributory in respect of 50 shares on which nothing had been paid.—Decision of the Master of the Rolls affirmed.—*Drummond's Case* (Law Rep.

SUBSCRIBER OF MEMORANDUM—*continued.*
4 Ch. 772) and *Pell's Case* (Law Rep. 5 Ch. 11) distinguished. *In re* Heyford Ironworks Company. Forbes and Judd's Case - - 270

4. —— *Company — Contributory — Paid-up Shares—Payment in kind.*] Nine persons bought a moiety of a colliery from *P.* for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests; the nominal amount of shares subscribed for being £20,000. The memorandum stated nothing as to the shares being treated as paid-up shares, but the articles provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted :—*Held* (reversing the decision of *Malins*, V.C.), that the subscribers of the memorandum of association were not liable as contributories, for that the shares must be taken as having been fully paid up by the handing over the colliery. *In re* Baglan Hall Colliery Company - - - - - 346

5. —— *Company — Contributory — Surrender of Shares before Entry on Register—Director—Indemnity against past Calls—Ultrà vires Act—Dealing in Shares.*] *H.*, one of the directors of a company, subscribed the memorandum of association for 500 shares, but only 250 were allotted to him. The articles of association, among other clauses relating to forfeiture, gave power to the directors to accept from any shareholder the surrender and forfeiture of his shares. The company were expressly prohibited from dealing in shares. The directors agreed to release *H.* from all liability with respect to the 250 shares not allotted to him; and a deed was executed and sealed with the company's seal, and approved at a general meeting of shareholders, by which *H.* was released from all future calls, and indemnified against all past liability in respect of those shares. Afterwards the company was wound up :—*Held* (affirming the decision of the Master of the Rolls), that the deed of release and indemnity was not an acceptance of a surrender and forfeiture under the articles, but was a dealing in shares by the company, and, as such, was *ultrà vires* on the part of the directors and the company; and, consequently, that *H.* must be on the list of contributories for all the shares for which he had signed the memorandum of association.—*Snell's Case* (Law Rep. 5 Ch. 22) distinguished. *In re* United Service Company. Hall's Case - - - - - - 707

SUBSTITUTIONAL GIFT - - 342, 713
See Gift, original or substitutional. 1, 2.

SUMMONS to rectify register—Form of - 95
See Rectification of Register.

SUPPLEMENTAL ORDER—Bankruptcy of Plaintiff - - - - - - 193
See Power to renew Leases.

SURPLUS—Charity not exhausting the whole income - - - - - 503
See Charity not exhausting the whole Income.

SURRENDER OF SHARES — Forfeiture — Subscriber of memorandum - - 707
See Subscriber of Memorandum. 5.

SURVIVORSHIP—Death without issue - 244
See Death coupled with Contingency.

TAXATION OF COSTS—*Bankruptcy—Registrar—6 & 7 Vict. c. 73, s. 37.*] The power of the Registrar to tax costs in bankruptcy is independent of the *Attorneys' and Solicitors' Act*, and a bill of costs may therefore be taxed by the Registrar without any special order, although twelve months have elapsed since its delivery.—The proceedings in a bankruptcy in a district Court were suspended under the 110th section of the *Bankruptcy Act*, 1861, and the bankrupt obtained his discharge before the passing of the *Bankruptcy Act*, 1869 :—*Held*, that the bill of costs of the assignee's solicitor for business done after the resolution to suspend proceedings, but before the order of discharge, was properly brought to the registrar of the district for taxation, and that he was bound to tax it, although more than twelve months had elapsed since its delivery. *Ex parte* Blair. *In re* Mackle - - - 482

2. —— *Solicitor—Amending Bill after Delivery.*] A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid the taxation of the bill by withdrawing it and delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations, which were partially acquiesced in. *In re* Heather 694

TENANT IN COMMON—Destroying or wasting the property—Injunction - - 180
See Partition Suit. 1.

—— Reversion—Partition suit - - 340
See Partition Suit. 2.

TENANT FOR LIFE AND REMAINDERMAN—Renewable leaseholds—Purchase of reversion - - - - - 214
See Renewable Leaseholds.

TRADE—Name of firm - - - 155
See Right to Name of Firm.

TRANSFER OF BUSINESS—Life insurance company - - - 118, 381, 632, 640
See Novation of Contract. 1—4.

TRANSFER OF BANKRUPTCY—Power of Chief Judge - - - - 486
See Second Adjudication.

TRANSFER OF CAUSE—Concurrent suits 467
See Concurrent Suits.

TRANSFER OF SHARES—*Company—Director—Transfer to escape Liability—Fraudulent Use of Power to make Calls—Practice—Power of Liquidator—Rectification of Register.*] A director of a company is not in the position of a trustee of his shares for the general body of shareholders, and under ordinary circumstances he may deal with them as freely as any other shareholder, provided he does not part with his qualification. But he is a trustee of his power of making calls for the general body of shareholders, and must

TRANSFER OF SHARES—*continued.*
not use it for his own benefit, without regard to their interests.—By the articles of association of a company, the directors had power to refuse to register the transfer of shares until the calls due on them were paid. But this rule was not to apply to a transfer which had been lodged for registration before the call was declared.—On the 17th of April the directors agreed to make a call in order to prevent the transfer of numerous shares which was threatened by some of the shareholders, but the declaration of the call was postponed until the 23rd, when it was formally made. On the 18th of April one of the directors transferred some of his shares to his clerk, under circumstances which shewed that he did so to escape liability; and the transfer was left for registration on the same day, and registered on the 20th, the other directors being cognisant of the transaction. The company was afterwards wound up:—*Held*, that inasmuch as it appeared that the formal declaration of the call had been postponed in order to assist the transferor in getting the transfer registered, the registration was void, and the transferor was put on the list of contributories in respect of the shares.—The order of the Master of the Rolls affirmed, but on different grounds.—Whether a liquidator in a voluntary winding-up under supervision has power to rectify the register of shareholders without applying to the Court, *quære*. *In re* National Provincial Marine Insurance Company. Gilbert's Case - - - - - - 559

—— Transfer to avoid liability - - 95
See Rectification of Register.

TRUSTS — Creditors' deed — Jurisdiction to administer - - - 219, 746
See Trusts of Creditors' Deed. 1, 2.

TRUSTEE—Appointment of new trustee—Trustee Act, 1850 - - - 662, 678
See Trustee Act, 1850. 1, 2.

—— Constructive—Non-investment of funds 74
See Limitations, Statute of. 1.

—— Costs—Acting as partisan - - 193
See Power to renew Leases.

—— Employing money in business—Compound interest - - - - 233
See Limitations, Statute of. 2.

—— Power to renew leases—Enfranchisement
See Renewable Leaseholds. [214

TRUSTS OF CREDITORS' DEED—*Administration of Trusts—Concurrent Jurisdiction of Chancery and Bankruptcy—Special Circumstances—Pleading.*] The jurisdiction of the Court of Chancery in the administration of creditors' deeds is not excluded by the *Bankruptcy Act*, 1861; but the Court of Chancery will not exercise its jurisdiction except in cases where the Court of Bankruptcy is unable to give adequate relief.—A creditor filed a bill against the trustees of a creditors' deed, alleging that one of the trustees had purchased some of the property at an undervalue, and praying that the sale might be set aside, and the trusts of the deed administered by the Court:—*Held*, that this was not a sufficient ground for the exercise of the jurisdiction of the Court, and the bill was dismissed with costs.—*Martin* v. *Powning* (Law Rep. 4 Ch. 356) approved

TRUSTS OF CREDITORS' DEED—*continued.*
of.—An objection to the jurisdiction, although not raised in the pleadings, was allowed to be taken at the hearing, the state of the law on the question of jurisdiction having been unsettled at the time of filing of the bill. Stone *v.* Thomas [219

2. —— *Bankruptcy Act*, 1861 — *Chancery—Jurisdiction—Inspectorship Deed—Proof of Execution.*] Inspectors claiming as Plaintiffs under a deed of inspectorship registered under the *Bankruptcy Act*, 1861, must prove the assents to the deed of the creditors.—A debtor, by a deed registered in Bankruptcy, covenanted when required to assign his estate to inspectors to be administered as in Bankruptcy. He afterwards became bankrupt. The inspectors filed a bill against the assignee in Bankruptcy, and a mortgagee of the debtor, claiming the balance in the hands of the mortgagee:—*Held* (affirming the decision of the Master of the Rolls), that the Court of Chancery would not exercise its jurisdiction between the inspectors and the assignee, as both were subject to the Court of Bankruptcy. Phillips *v.* Furber - - - - 746

TRUSTEE ACT, 1850, *ss.* 3, 20—*Covenant to surrender Copyholds—New Trustee—Person of Unsound Mind.*] A vendor covenanted in the usual way to surrender copyholds to the purchaser, and the purchase-money was paid. The vendor died before surrender. His customary heir was of unsound mind. The covenant contained no declaration that the vendor and his heirs would until surrender hold the premises in trust for the purchaser:—*Held*, that a person might be appointed under the *Trustee Act*, 1850, to convey to the purchaser, without a suit being instituted to have the heir declared a trustee. *In re* Cuming 72

2. —— *s.* 32 — *Practice* — *New Trustee—Lunatic* — *Chancery.*] When the person having power to appoint a new trustee is a lunatic, found so by inquisition, an order appointing a new trustee may be made in Chancery under the *Trustee Act*, 1850, s. 32. *In re* Sparrow - 662

3. —— *ss.* 5, 24—*Lunatic—Co-Trustee—Vesting Order.*] One of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything:—*Held*, that an order could be made vesting the right to transfer the shares in the persons beneficially entitled. *In re* White, a Person of unsound Mind - - - 698

TRUSTEE RELIEF ACT—*Jurisdiction—Costs.*] Where a particular fund is paid into Court under the Act for the relief of trustees, by an executor who has the general residue in his hands, the Court has jurisdiction to order the costs of a petition relating to the particular fund to be paid out of the general residue.—Order of *Stuart*, V.C., affirmed, with a variation. *In re* Trick's Trusts. *Ex parte* Willoby - - - - - 170

ULTRÀ VIRES — Building society — Power to borrow - - - 4, 309
See Building Society. 1, 2.

—— Buying up shares - - - 444
See Unauthorized Dealing in Shares.

ULTRÀ VIRES—*continued.*

—— Forfeiture of shares - - - 79
See Forfeiture of Shares. 2.

—— Injunction against—*Locus standi* of Plaintiff
See Restraining ultrà vires Act. [621

—— Release of shareholder - - 707
See Subscriber of Memorandum. 5.

UNAUTHORIZED DEALING IN SHARES—*Company—Power of Directors—Ultrà vires—Articles of Association—Notice.*] Unless the memorandum and articles of association of a company contain in plain terms an express power enabling the company to purchase their own shares, such purchase is *ultrà vires*, although the company may be empowered to deal in shares of joint stock companies generally.—Where, therefore, the broker of a banking company, acting under the instructions of the directors, bought shares in the company on behalf of the company, and was credited with the price paid by him for the shares in his banking account kept with the company, and the company was afterwards wound up:—*Held* (reversing the decision of the Master of the Rolls), that the broker was not entitled to prove against the company for so much of the balance due to him as represented the price of the shares.—And *semble*, if the price of the shares had been actually paid to the broker by the directors, he would have been liable to refund it. *In re* London, Hamburg, and Continental Exchange Bank. Zulueta's Claim - - - - 444

—— Knowledge of director - - - 763
See Misconduct of Directors.

UNCERTAIN GIFT—*Will—Construction—Charitable Gift—Uncertainty—"Any other Religious Institution or Purposes."*] A testatrix gave legacies to several charitable institutions, and then gave her residuary personal estate "to and amongst the different institutions, or to any other religious institution or purposes as *A.* and *B.* might think proper":—*Held* (affirming the decision of the Master of the Rolls), that the bequest of the residue was a good charitable gift, and not void for uncertainty. Wilkinson *v.* Lindgren - 570

"UNDERTAKING"—Charge on debenture 318
See Debenture.

UNDERTAKING AS TO DAMAGES—Injunction in bankruptcy - - - 473
See Injunction in Bankruptcy.

UNREASONABLENESS OF CREDITORS' DEED—*Bankruptcy Act*, 1861, *s.* 192—*Inequality.*] By a deed expressed to be made between *N.* of the first part, *D.* (a creditor of *N.*) of the second part, and all *N.'s* creditors of the third part, and registered under sect. 192 of the *Bankruptcy Act*, 1861, *N.* and *D.* covenanted with all the other creditors for payment to them of a composition of 4*s.* in the pound on their debts; and all the creditors released *N.* from the original debts, subject to a proviso making the deed void on default in payment of the composition, and *N.* assigned over his property to *D.* absolutely:—*Held*, that this deed was not on its face void as giving an undue advantage to *D.*—*Bissell* v. *Jones* (Law Rep. 4 Q. B. 49) followed. *Ex parte* Nicholson. *In re* Nicholson [332

UNSOUND MIND—Person of—Trustee Act 72
See Trustee Act, 1850. 1.

VENDOR AND PURCHASER — Assignment of contract—Notice - - - 604
See Sub-Contract.

—— Husband and wife—Refusal of wife to convey - - - - - 534
See Sale by Husband and Wife.

—— Occupation rent—Trade premises - 716
See Occupation Rent.

—— Purchase by person in fiduciary position 551
See Sale by Court.

—— Railway company—Lien for unpaid purchase-money - - - - 414
See Vendor's Lien against Railway Company.

—— Surrender of copyholds - - 72
See Trustee Act, 1850. 1.

—— Valuation of furniture - - - 648
See Enforcing Agreement for Arbitration. 2.

VENDOR'S LIEN AGAINST RAILWAY COMPANY—*Unpaid Landowner—Receiver—Injunction.*] A person who had sold to a railway company some land over which the railway had been made and opened, obtained a decree ordering specific performance, and declaring his lien for the balance of purchase-money. The company having become insolvent, an order was made, on the Petition of the vendor, for sale of the land and payment of the deficiency, and for an injunction restraining the company until payment from running any engine over, or otherwise using or continuing in possession of the land:—*Held* (varying the order of *James*, V.C.), that an injunction was not the proper form of relief, as it would make the land useless to both parties. The order for an injunction was therefore discharged, and an order made for a receiver, with a direction to the company to give him immediate possession.—Where land purchased by a railway company is sold to enforce the vendor's lien for unpaid purchase-money, it is sold free from all claims of the public to use it as a highway. Munns *v.* Isle of Wight Railway Company - - - 414

VESTING—Gift, original or substitutional—Remoteness - - - - 713
See Gift, original or substitutional. 2.

VOLUNTARY WINDING-UP — Supervision — Liquidator's accounts - - 437
See Liquidator's Accounts.

VOTING—Liquidation by arrangement—Signature of creditors - - - 722
See Majority of Creditors.

WASTE—By one tenant in common - 180
See Partition Suit. 1.

WILL—Annuity—Charged on *corpus* - 684
See Annuity charged on Corpus.

—— Appointment by general bequest - 26
See Appointment by General Bequest.

—— Charity not exhausting the whole income [503
See Charity not exhausting the whole Income.

—— Covenant to make—Marriage articles 182
See Will in pursuance of Marriage Articles.

WILL—*continued.*

—— Death coupled with contingency - 244
See Death coupled with Contingency.

—— Devise without words of limitation - 408
See Devise without Words of Limitation.

—— Remoteness - - - - 342
See Gift, original or substitutional. 1.

—— Substitutional gift - - 342, 713
See Gift, original or substitutional. 1, 2.

—— Uncertainty - - - - 570
See Uncertain Gift.

WILL IN PURSUANCE OF MARRIAGE ARTICLES—*Covenant—Lapse.*] A father, on the marriage of his daughter, covenanted that if she should survive him, or leave any child, children, or issue, he would by will give and devise, or otherwise effectually settle and assure to trustees, a share equal with his other children of the property he should have at his death to the uses therein mentioned, being uses for the benefit of the husband and wife and the children of the marriage, with a clause of survivorship and accruer in the event of children dying under twenty-one and without issue. Some years afterwards the father made a will, giving property to trustees upon the trusts therein declared, the limitations being in substance the same as those set out in the articles. The children of the marriage all died without issue in the lifetime of the covenantor, one of them only having attained twenty-one. The wife survived her father:—*Held* (reversing the decision of *Malins*, V.C.), that the representatives of the child who attained twenty-one were not entitled to anything, for that the covenantor was at liberty to make a settlement either by deed or will, and that he was not bound by the covenant so to frame his will as to guard the child's interest from lapse. *In re* Brookman's Trust - - - - - 182

WINDING-UP—Acceptance of shares—Agent
See Acceptance of Shares. 3. [489

—— Acceptance of shares—Conditional 294, 305
See Acceptance of Shares. 1, 2.

—— Calls—Proof under creditors' deed - 400
See Bankrupt Shareholder.

—— Debenture holder—Remedies of - 318
See Debenture.

—— Deceased shareholder—Liability of executors - - - - 725
See Deceased Shareholder.

—— Disposition of property before - 567
See Dispositions before Winding-up Order.

—— Foreign company - - - 363
See Winding-up Petition. 1.

—— Forfeiture of shares - - 63, 79
See Forfeiture of Shares. 1, 2.

—— Infant shareholder - 298, 302, 614
See Infant Transferee. 1, 2, 3.

—— Interest on debts - - 86, 88, 112
See Interest in Winding-up. 1, 2, 3.

—— Irish winding-up—How enforced in *England*
See Irish Winding-up. [93

—— Life insurance company—Transfer of business - - - 118, 381, 632, 640
See Novation of Contract. 1—4.

WINDING-UP—*continued.*

—— Past members—Contributions, how to be divided - - - - 428
See Past Members.

—— Petition - - - - 363, 600
See Winding-up Petition. 1, 2.

—— Petitioning creditors' debt—Building society - - - - - 309
See Building Society. 2.

—— Petitioning creditor's debt—Policy-holder—Transfer to another office - 632, 640
See Novation of Contract. 3, 4.

—— Proof by agent for prospective commission
See Prospective Commission. [737

—— Proof—Bill of exchange accepted by directors - - - - - 567
See Dispositions before Winding-up Order.

—— Proof by broker—Buying up shares - 444
See Unauthorized Dealing in Shares.

—— Proof—Debts carrying interest 86, 88, 112
See Interest in Winding-up. 1—3.

—— Proof—Overdue bill of exchange - 358
See Overdue Bill of Exchange.

—— Proof by mortgagee - - - 433
See Proof by Mortgagee.

—— Proof—Putting in claim - - 18
See Creditor holding Security. 1.

—— Proof—Secured creditor - - 18, 167
See Creditor holding Security. 1, 2.

—— Receiver, choice of—Appeal - - 420
See Receiver.

—— Rectification of register—Form of summons
See Rectification of Register. [95

—— Set-off—Bankrupt shareholder - 492
See Set-off in Winding-up.

—— Subscriber of memorandum 11, 22, 270, 346, [707
See Subscriber of Memorandum. 1—5.

WINDING-UP PETITION—*Company for Foreign Business registered in England — Winding-up Order — Shares transferable by delivery.*] If it appears from the memorandum and articles of association of a company that some kind of management and business in *England* is contemplated, the company comes within the provisions of the *Companies Act*, 1862, and may be properly registered under that Act, although all the subscribers to the memorandum and all the directors are foreigners residing abroad.—But if, after it has been registered, such a company does not carry on business in this country, proceedings may be taken to have it wound up; and the Court has jurisdiction to make a winding-up order, although all its shareholders are foreigners and it has never transacted any business in *England*.—The articles of association of a limited company, registered under the *Companies Act*, 1862, conferred a power on the directors to issue certificates of shares transferable by delivery. *Quære*, whether this provision was legal. But *held*, that if it was not legal it would not render the company illegal nor preclude it from being wound up under the order of the Court.—The decision of *Malins*, V.C., reversed. *In re* General Company for the Promotion of Land Credit - - - 363

WINDING-UP PETITION—*continued.*

2. —— *Locus standi of Respondents—Appeal.*] No person has a right to be heard against a Petition for winding up a company, except creditors and contributories. And although the Court may reasonably hear other persons who have an interest in the property of the company as *amici curiæ*, yet such persons cannot appeal against the decision.—Upon a Petition to wind up a canal company, presented by the company, another canal company, whose canal communicated with that of the petitioning company, were heard in opposition to the Petition:—*Held*, that the opposing company had no *locus standi* to appeal against the winding-up order. *In re* Bradford Navigation Company - - - - - 600

WITNESS—Mistake of—Leave to file bill of review - - - - - 763
See Misconduct of Directors.

—— Professional privilege - - - 703
See Privileged Communication.

WITHDRAWAL OF APPEAL—*Practice—Leave to withdraw Appeal—Costs—Information.*] Where Appellants who have set down their appeal obtain leave to withdraw it, they will only be ordered to pay such costs as they would have had to pay if the appeal had been heard that day and dismissed with costs.—The Relators in an information appealed against the decree of the Vice-Chancellor. After the appeal was set down costs were incurred by an application to the Attorney-General to withdraw his fiat. The Appellants then applied for leave to withdraw the appeal.—The Court, on giving leave, refused to make any special order as to the costs occasioned by the application to the Attorney-General. Attorney-General *v.* Corporation of Halifax - - - 116

WORDS—"Any other religious institution or purposes" - - - - 570
See Uncertain Gift.

—— "Winning coals" - - - 103
See Mining Lease.

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